IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL HOWARD,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 81278
81279

RESPONDENT'S ANSWERING BRIEF

**Appeal From Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County**

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STATEMENT OF THE ISSUE(S)

1. Whether the district court's adoption of the State's proposed Findings was proper.
2. Whether the district court properly found that Appellant's Sixth Petition was procedurally barred.
3. Whether Appellant cannot demonstrate good cause, prejudice, or actual innocence to overcome the procedural bars.

STATEMENT OF THE CASE

The District Court provided the following procedural history for this case in its 2020 Findings of Fact, Conclusions of Law and Order Denying Sixth Petition for Writ of Habeas Corpus (Post-Conviction):

On May 20, 1981 Howard was indicted on one count of robbery with use of a deadly weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one count of robbery with use of a deadly weapon involving Dr. George Monahan and one count of murder with use of a deadly weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.

Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office.

On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public defender to Howard's case.

Howard's counsel requested a one-week continuance to consult with Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After discussion, the district court accepted a plea of not guilty and set a trial date of January 10, 1983.

Howard filed a motion in late in December asking for his counsel to be removed and substitute counsel appointed. Counsel filed a response addressing issues raised in the motion. After a hearing, the district court determined there were no grounds for removing the Clark County Public Defender's Office.

A motion for a psychiatric expert was filed. At a hearing, the district court inquired if this was for competency and Howard's counsel indicated it was not, but it was to help evaluate Howard's mental status at the time of the events. The district court granted the motion and appointed Dr. O'Gorman to assist the defense.

At a status check on January 4, 1983, defense counsel indicated the defense could not be ready for the January 10th trial date due to the need to conduct additional investigation and discovery. In addition, counsel noted Howard was refusing to cooperate with counsel. Howard objected to any continuance with knowledge that his attorneys' could

not complete the investigations by that date. Given Howard's objections, the district court stated the trial would go forward as scheduled.

On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's conflict created mistrust in Howard and he therefore refused to cooperate. This motion was denied. Defense counsel then moved for a continuance as they did not feel comfortable proceeding to trial in this case, given the issues involved, with only six weeks to prepare. After extensive argument and a recess so that counsel could discuss the issue with Howard, the district court granted the continuance over Howard's objections.

The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983. The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a scheduling problem. Because the district judge was on vacation, someone referred the juror to the District Attorney's Office. That Office referred the juror to the jury commissioner. Howard moved for a mistrial or elimination of the death penalty as a sentencing option based upon this contact. After conducting an evidentiary hearing, the district court denied Howard's motions.

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not tell them the substance of his testimony. Finally, counsel indicated they had attempted to get military and mental health records but were unsuccessful because the agencies possessing the records would not send copes [sic] without a release signed by Howard and Howard refused to sign the releases. The district court canvassed Howard if this was correct and Howard confirmed it was true and that he did not want any mitigation presented. The district court found Howard understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State originally alleged three aggravating circumstances:

1) the murder was committed by a person who had previously been convicted of a felony involving the use of violence - namely robbery with use of a deadly weapon in California, 2) prior violent felony - a 1978 New York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder occurred in the commission of a robbery. Howard moved to strike the California conviction because the conviction occurred after the Monahan murder and the New York conviction because it was not supported by a judgment of conviction. The district court struck the California conviction but denied the motion as to the New York conviction, noting that the records reflected a jury had convicted Howard and the lack of a formal judgment was the result of Howard's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and Howard took the stand and related information on his background. During a break in the testimony, Howard suddenly stated he did not understand what mitigation meant and that he would leave it up to his attorneys to decide what to do. The district court asked Howard if he was now instructing his attorneys to present mitigation and he refused to answer the question. Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel asked for time to prepare which was granted. The jury found both aggravating circumstances existed and that no mitigating circumstances outweighed the aggravating circumstances. The jury returned a sentence of death.

Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher represented Howard on Direct Appeal. Howard raised the following issues on direct appeal: 1) ineffective assistance of counsel based on actual conflict arising out of Jackson's relationship with Dr. Monahan; 2) denial of a motion to sever the Sears' count from the Monahan counts; 3) denial of an evidentiary hearing on a motion to suppress Howard's statements and evidence derived therefrom; 4) refusal to instruct the jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the felony robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the relationship of two members of the Public Defender's Office with Monahan did not

objectively justify Howard's distrust and there was no evidence that those attorneys had any involvement in his case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this basis had no merit. The Court further concluded the district court did not abuse its discretion by refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion. The Court noted that the record reflected proper Miranda warnings were given and the statements were admitted as rebuttal and impeachment after Howard testified. The Court also found that the district court did not error in rejecting the two accomplice instructions; the anti-sympathy language in one of the instructions was not err in light of the totality of the instructions and the record supported the district court's refusal to instruct on certain mitigating circumstances for lack of evidence. The Court concluded by stating it had considered Howard's other claims of error and found them to be without merit. Howard filed a petition for rehearing which was denied on March 24, 1987. Remittitur was stayed pending the filing of a petition for Writ of Certiorari to the United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent Howard on the writ petition. The petition was denied on October 5, 1987 and remittitur issued on February 12, 1988.

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with "future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed on October 3, 1988. The district court entered an oral decision denying the petition on February 14, 1989. The district court concluded that trial counsel performed admirably under difficult circumstances created by Howard himself. As to the failure to present an insanity defense and present mental health records, the court found that Howard was canvassed throughout the proceedings about his refusal to cooperate in obtaining those records, particularly his refusal to sign releases. Howard knew what was going on, was competent and was trying to manipulate the proceedings and that there was no evidence to support an insanity defense, therefore counsel were not ineffective in this regard.

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper, the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of fact and conclusions of law were filed on July 5, 1989.[1]

The Nevada Supreme Court affirmed the district court's denial of Howard's first State petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal Howard raised ineffective assistance of trial and appellate counsel regarding the prosecutorial misconduct issues. The Supreme Court found three comments to be improper under Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)[2]: 1) a personal opinion that Howard merited the death penalty, 2) a golden rule argument – asking the jury to put themselves in the shoes of a future victims and 3) an argument without support from evidence that Howard might escape. The Court found that counsel were ineffective for failing to object to these arguments but concluded there was no reasonable probability of a contrary result absent these

[1]During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

[2] Collier was decided two years after Howard's trial.

remarks and therefore no prejudice. The Court rejected Howard's other contentions of improper argument.

With respect the mitigation evidence issues, the Nevada Supreme Court upheld the district court's findings that this was a result of Howard's own conduct and not ineffective assistance of counsel.[3]

Howard proceeded to file a second Federal habeas corpus petition on May 1, 1991. This proceeding was stayed for Howard to exhaust his state remedies on October 16, 1991. Howard then filed a second State petition for post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error.

The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. In his reply, Howard dropped his speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they had been exhausted and Howard could proceed in Federal court.

The district court denied the petition on July 7, 1992. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the case. The district court further concluded that any claim of cumulative error and any issues not raised in previous proceedings were procedurally barred. Finally, the district court found the speedy

[3] The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks violated Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). The State noted that Howard's trial occurred before Collier therefore the Court should not sanction counsel for conduct that occurred before the Court issued the Collier opinion. Rehearing was denied February 7, 1991.

trial violation was a naked allegation, frivolous and procedurally barred.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. The Order Dismissing Appeal found that Howard's second State petition was so lacking in merit that briefing and oral argument was not warranted. Howard filed a petition for Writ of Certiorari challenging the summary affirmance and the United States Supreme Court denied the request on October 4, 1993.

On December 8, 1993, Howard returned to federal court and filed a new pro se habeas petition rather than lifting the stay in the previous petition. After almost three years, on September 2, 1996, the federal district court dismissed the petition as inadequate and ordered Howard to file a second amended federal petition that contained more than conclusory allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years, on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

Howard filed his third State petition for post-conviction relief on December 20, 2002. Patricia Erickson represented him on this petition. The petition asserted the following claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4) trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a matter of law and accomplice testimony should be viewed with distrust instructions – Dwana Thomas; 6) improper jury instructions – diluting standard of proof - reasonable doubt, second degree murder as lesser included of first degree murder, premeditation, intent and malice instructions; 7) improper jury instructions – failure to clearly define first degree murder as specific intent crime requiring malice and premeditation; 8) improper premeditation instruction blurred distinction between first and second degree murder; 9) improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give influence of extreme mental or emotional disturbance mitigator instruction; 12) improper limitation of mitigation by giving

only "any other mitigating circumstance" instruction; 13) failure to instruct that mitigating circumstances findings need not be unanimous; 14) prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of death penalty, improper argument regarding rehabilitation, escape and future killings; comparing Howard and victim's lives, comparing Howard to notorious murder (Charles Manson) and improper community benefit argument; 15) use of felony robbery as aggravator and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective assistance of trial counsel – inadequate contact, conflict of interest, failure to contact California counsel to obtain records, failure to obtain Patton and Atescadero hospital records, failure to obtain California trial transcripts, failure to review Clark County Detention Center medical records, failure to challenge competency to stand trial, failure to obtain suppression hearing, failure to present legal insanity, failure to object to reasonable doubt instruction, failure to view visiting records and call witnesses based upon same, failure to call Pinkie Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt, failure to obtain military records, failure to adequately explain concept of mitigation evidence, failure to object to prosecutorial misconduct in closing arguments, failure to refute future dangerousness argument, failure to object to trial court's limitation of mitigating circumstances and failure to object to instructions which allegedly required unanimous finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-conviction counsel – failure to adequately investigate and develop all trial and appeal claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary, irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual punishment and 23) the death penalty violates evolving standards of decency.

The State filed a motion to dismiss Howard's third State petition on March 4, 2001. The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one-year limit) and NRS 34.800 (five-year laches) and that Howard had not shown good cause for delay in raising the claims to overcome the procedural bars. The State also analyzed each claim and noted what issues had already been raised and decided adversely to Howard or should have been raised and were waived under NRS 34.810.

Howard filed an amended third State petition. The amended petition expanded the factual matters under Claim 17 regarding Howard's family background that Howard asserted should have been presented in mitigation.

On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his third State petition. As good cause for delay, Howard alleged Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply because the State had not shown prejudice and the presumption of prejudice was overcome by the allegations in the petition.

The State filed a reply to the opposition on September 24, 2003. The district court issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing good cause for delay. The district court also independently dismissed the claims under NRS 34.810. Written findings were entered on October 23, 2003.

Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the district court's dismissal of the third State petition on December 4, 2004. The High Court addressed Howard's assertions that he had either overcome the procedural bars or they could not constitutionally be applied to him and rejected them. Among its conclusions, the Court noted that the record reflected Howard was aware that all his claims challenging the conviction or imposition of sentence must be joined in a single petition and that Howard had no right to post-conviction counsel at the time of the filing of his first and second State petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel could not be good cause for delay.[4]

Howard then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23,

[4] See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, the current Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay this case for several months while Howard sought permission from the Federal District Court to hold his federal petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

The United States District Court denied Howards' motion for stay and abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.[5] Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

Argument on the State's motion to dismiss was heard on February 4, 2010. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010, dismissing the Fourth State Petition as procedurally barred. A written Findings of Fact and Conclusions of Law was filed on November 6, 2010.

Petitioner challenged this Court's decision before the Nevada Supreme Court. Prior to ruling on this Court's fourth denial of habeas relief, the Nevada Supreme Court issued an opinion in Howard v. State, 128 Nev. 736, 291 P.3d 137 (2012), addressing the sealing of documents. The Federal Public Defender (FPD) filed a motion in the Supreme Court to substitute counsel that included information that was potentially embarrassing to one or more current or former FPD attorneys as well as a prior private attorney who had represented

[5] Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010. Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on May 11, 2010.

Howard. Id. at 747, 291 P.3d at 144. A cover sheet indicated that the motion was sealed but the FPD failed to file a separate motion to seal the pleading. Id. at 739, 291 P.3d at 139. The Court concluded that the FPD had not properly moved to seal and that sealing was unjustified. Id. at 748, 291 P.3d at 145. Ultimately, the Court affirmed this Court's denial of habeas relief. (Order of Affirmance, filed July 30, 2014, attached to Clerk's Certificate, filed October 24, 2014). The United States Supreme Court denied certiorari. Howard v. Nevada, __ U.S. __, 135 S.Ct. 1898 (2015).

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Fifth Petition) on October 5, 2016. Respondent filed an opposition and motion to dismiss on November 2, 2016. On March 27, 2017, Petitioner filed an opposition to the State's request to dismiss the Fifth Petition. Respondent's reply to Petitioner's opposition was filed on April 4, 2017.

On December 1, 2016, Petitioner filed an Amended Fifth Petition. The State moved to strike the Amended Fifth Petition for failing to comply with NRS 34.750(5). Petitioner opposed this request. This Court held a hearing on March 17, 2017, and after entertaining argument, struck the Amended Fifth Petition pursuant to NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). An order memorializing this decision was filed on April 7, 2017.

On April 6, 2017, Petitioner filed a Motion to Amend or Supplement that requested reconsideration of this Court's decision to strike his Amended Fifth Petition without requesting leave to do so in advance. Respondent filed an opposition on April 12, 2017, and Petitioner replied on April 17, 2017.

Howard's Fifth Petition and Motion to Amend or Supplement came before this Court on the April 19, 2017, Chamber Calendar. On May 2, 2017, this Court issued a minute order denying the Fifth Petition and the Motion to Amend or Supplement and imposing a $250.00 sanction upon Howard's counsel for causing the State to respond to a the Motion to Amend when the Court had already decided the issue in the context of striking the Amended Fifth Petition and/or for failing to seek leave of court prior to requesting reconsideration.

Notice of Entry of Order was filed on May 23, 2017. (Notice of Entry of Order, filed May 23, 2017).

Petitioner filed a Notice of Appeal on June 1, 2017. (Notice of Appeal, filed June 1, 2017). Additionally, Petitioner successfully sought extraordinary review of the sanction order. (Armeni v. Dist. Ct.,

Nevada Supreme Court Case Number 73462, Order Granting Petition in Part and Denying Petition in Part, filed April 25, 2018).

On September 4, 2018, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Sixth Petition). (Petition for Writ of Habeas Corpus (Post-Conviction), filed September 4, 2018). The State moved to strike on September 7, 2018. (Motion to Strike Sixth Petition for Writ of Habeas Corpus (Post-Conviction), filed September 7, 2018). Petitioner opposed on September 14, 2018. (Opposition to Motion to Strike, filed September 14, 2018). The State replied on September 20, 2018. (Reply to Opposition to Motion to Strike Sixth Petition for Writ of Habeas Corpus (Post-Conviction, filed September 20, 2018). This Court stayed the Sixth Petition pending the outcome on appeal of the denial of the Fifth Petition since both challenged the validity of the sentencing. (Recorder's Transcript of October 23, 2018, Hearing, p. 4-5, filed November 16, 2018).

On September 7, 2018, the State moved to transfer the Sixth Petition back to the criminal case. (Motion to Transfer Petition to Criminal Case, filed September 7, 2018). Petitioner opposed on September 12, 2018. (Opposition to Motion to Transfer, filed September 12, 2018). The State replied on September 13, 2018. (Reply to Opposition to Motion to Transfer Petition to Criminal Case, filed September 13, 2018). Eventually the parties stipulated to transferring the habeas proceeding back into the criminal case. (Stipulation, filed November 6, 2019). An order transferring the case was filed on November 7, 2019. (Order Granting Motion to Transfer Petition to Criminal Case, filed November 7, 2019).

On September 27, 2019, Petitioner moved to lift the stay on the Sixth Petition because the Nevada Supreme Court issued an Order of Affirmance upholding the denial of the Fifth Petition on September 20, 2019. (Motion to Lift Stay, filed September 27, 2019). The State did not oppose this request. An order lifting the stay was filed on November 19, 2019. (Order Granting Petitioner's Motion to Lift Stay, filed November 19, 2019).

Ultimately, due to the COVID-19 pandemic the Court decided this matter without oral argument on May 4, 2020. (Odyssey Register of Actions, May 4, 2020, Court Minutes). The Court directed Respondent to prepare findings of fact and conclusions of law consistent with the court minutes. Id.

III AA 502-510. On May 18, 2020, the district court filed its Findings of Fact, Conclusions of Law and Order Denying Sixth Petition for Writ of Habeas Corpus (Post-Conviction). III AA 502-510.

STATEMENT OF THE FACTS

The District Court set forth the following facts of this case in its 2020 Findings of Fact, Conclusions of Law and Order Denying Sixth Petition for Writ of Habeas Corpus (Post-Conviction):

> On March 26, 1980, around noon, a Sears' security officer, Keith Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. Kinsey approached Howard and asked him to accompany Kinsey to a security office. Kinsey enlisted the aid of two other store employees. Howard was cooperative, alert and indicated there must be some mistake. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard threatened to kill the three men if they followed him and he fled to his car in the parking lot. A yellow gold jewelry ID bracelet was found at the scene and impounded. It was later identified as Howard's. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.
>
> Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had told her to wait for him and she was unaware of his intentions to obtain money through a false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own business.

Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the car for a few hours. Thomas and Howard walked about and Howard made some phone calls. Later that evening Howard left for a couple of hours. When he returned he told Thomas that he had met up with a pimp, but the pimps' girls were with him so he couldn't rob him. Howard indicated he had arranged to meet with the "pimp" the next morning and would rob him then.

Howard and Thomas drove to the Western Six motel located on the Boulder Highway near the intersection of Desert Inn Road. The couple had stayed at this motel before and Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel registration card under that name was admitted into evidence and a documents' examiner compared handwriting on the card with Thomas' and indicated they matched.

Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen before. Howard told Thompson that he was tired of Las Vegas and to pack up their things as they were leaving for California.

Dr. Monahan was a dentist with a practice located on Desert Inn Road within walking distance of the Boulevard Mall. He was attempting to sell a uniquely painted van and would park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and near the Sears store, then walk to his office. The van had a sign in it listing Dr. Monahan's home and business phone numbers and the business address.

About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the van. The caller was a male who identified himself as "Keith" and stated he was a security guard at Caesar's Palace. He indicated he was interested in purchasing the van and wanted to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs. Monahan indicated the caller would have to talk to her husband who was expected home shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to meet "Keith" at Caesar's later that night.

The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met "Keith" that evening at the appointed time and place. Howard was identified as the man who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the van but did not touch the door handle while doing so. Howard arranged to meet Dr. Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the van at Dr. Monahan's office before returning home in another vehicle.

The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr. Monahan was not there and a patient was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office. Dr. Monahan had not entered the office. A black man wearing a radio or walkie-talkie on his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and stating that he had an appointment with the doctor.

Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description she gave worked security. After obtaining this information, Mrs. Monahan called the police to report her husband as a missing person. This occurred at about 9:00 a.m.

Charles Marino owned the Dew Drop Inn located near the corner of Desert Inn and Boulder Highway, just a few blocks from Dr. Monahan's office and almost across the road from the Western Six motel. Early on the morning of March 27, 1980, as he approached his business, he observed the Monahan van backing into the rear of the bar. When he arrived at the Inn, he looked in the driver's side and saw no one. He asked patrons if they knew anything about the van and no one spoke up. Marino remained at the business until the early afternoon. The van was still there and had not been moved. Later that day, at around 7:00 p.m. he received a call to return to the bar as a dead body had been found in the van.

In response to television coverage, the police learned the Monahan van was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an overturned table and some coverings. He had been shot once in the head. The bullet went through Dr. Monahan's head and a projectile was recovered on the floor of the van. The projectile was compared to Howard's .357 revolver. Because the bullet was so badly damaged; forensic analysis could not

establish an exact match. It was determined that the bullet could have come from certain makes and models of revolvers, Howard's included. The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet were missing. A fingerprint recovered from one of the van's doors matched Howard's.

Homicide detectives were aware of the Sears robbery that had occurred on March 26th. The description of the Sears suspect matched that given by Mrs. Monahan of the man calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the walkie-talkie in possession of the suspect, the close proximity of the dental office to the Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a bulletin to state and out-of-state law enforcement agencies describing the suspect and the car used in the Sears' robbery.

On March 27, 1980, while the police were searching for Dr. Monahan, Howard and Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on the way they stopped for gas. At that time Howard had a brown or black wallet that had credit cards and photos in it. Howard went to the gas station rest room and when he returned he no longer had the wallet.

On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino, California. Once again Howard left Thompson in the car while he entered the Sears, picked up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears security badge in the attempt. The Sears personal were suspicious and left Howard at the register while they called Las Vegas. When they returned Howard had left. Howard had returned to the car and Thompson and Howard ducked down when the people from Sears stepped outside to view the parking lot.

On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He entered a jewelry store and talked to a security agent, Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed Howard walking up and down the aisles of the drugstore, picking items up and replacing them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No gun was found on him nor was he

carrying the walkie-talkie. A search of the aisles he had been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge stolen from Kinsey.

Howard was arrested for carrying a concealed weapon and then identified and booked for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police officers. Disputed evidence was presented regarding his response and whether he invoked his right to silence. Based on information in the all-points bulletin, the California authorities contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980, LVMPD Detective Alfred Leavitt went to California and, after reading Howard his Miranda rights, which Howard indicated he understood, interviewed Howard regarding the Sears robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to counsel at this time.

Howard told Detective Leavitt he recalled being at the Sears department store but no details about what happened and that he did not remember anything about March 27, 1980. He stated he could have killed Dr. Monahan but he didn't know.

Ed Schwartz was working as a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00 a.m. Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a New York driver's license and checkbook and told Schwartz that he worked for a security firm in New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a few blocks while Howard was the passenger. Howard asked if he could drive the car and the men switched seats. After driving for a short time, Howard pulled over and pointed an automatic pistol at Schwartz. Schwartz was told to get down on the floor of the car and remove his shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to do so and Howard drove off. The car was later found abandoned.[6]

Howard called witnesses who testified they saw the Monahan van being driven by a black man who did not match Howard's description, in particular the man had a large afro and Howard had short hair. John McBride state [sic] that he saw the van around 8:30 to 8:45 a.m. in his apartment complex which is located about five miles from Desert Inn and Boulder Highway. Lora Mallek was employed at a

[6] This evidence was admitted to show identity and motive for the Monahan murder.

Mobile gas station at the corner of DI and Boulder Highway and she stated serviced the van when it pulled into the station between 3:00 p.m. and 4:00 p.m. Mallek testified that a black man with a large afro was driving, a black woman who did not match Thomas' description was in the passenger seat and a white man was sitting in the back.

Howard testified over the objection of counsel. He indicated he did not recall much about March 26, 1980. He remembered being in Las Vegas in general on and off and that at one point Dwana Thomas' brother, who was about Howard's height, age and weight, and had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey could have been telling the truth about the Sears store. Howard indicated he wasn't sure because when the Sears people gathered around him, it reminded him of Vietnam and he kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he couldn't be that callous.

On cross-examination, Howard admitted he left New York in the middle of his robbery trial and was asked about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of aliases including Harold Stanback. Howard indicated he was taking the blame for Dawana and her brother Lonnie.

Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been in Las Vegas in March of 1980.

In the penalty phase, the State presented evidence on the details of Howard's 1979 New York conviction for robbery. A college nurse who knew Howard, Dorothy Weisband, testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a closet and demanded she removed her clothes. She refused and he left. After the robbery, Howard called Weisband trying to get more cash from her in return for her car and threatened her.

Howard testified regarding his military, family and mental health histories. Howard discussed his military service and stated he had suffered a concussion and received a purple heart.[7] Howard also stated he was on veteran's disability in New York.[8] He said he was in various

[7] The military records attached to the current Fourth Petition do not reflect any such injury or award.

[8] Howard's military records do not support this and there is nothing in the record substantiating any admission to a veteran's hospital. The record reflects Howard was

> mental health facilities in California including being housed in the same facility as Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering. When asked about his childhood, Howard became upset. He indicated he didn't want to talk about the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was doing at all times.

III AA 497-501.

SUMMARY OF THE ARGUMENT

First, under any review, the District Court's adoption of the State's proposed order was proper. Second, the District Court properly determined that Appellant's Sixth Petition was time-barred, barred by laches, barred based on waived grounds, and was an abuse of the writ. Third, Appellant cannot demonstrate good cause, prejudice, or actual innocence to overcome the mandatory procedural bars. The District Court accurately found the fact that Appellant had finally gotten around to challenging his New York conviction after thirty (30) years does not amount to good cause to ignore the procedural bars on his claim. Indeed, Appellant did not provide the District Court with any information below establishing how his New York conviction was invalidated or when he even began such process. Accordingly, any prejudice Appellant faces now is a result of his own inaction. Should the Court disagree, the appropriate remedy would be an evidentiary hearing to explore why

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never actually admitted to a hospital in New York because it required identification and he could not identify himself due to existing warrants for his arrest.

Appellant took thirty (30) years to get his New York robbery conviction vacated and when he began such process.

ARGUMENT[9]

I. THE DISTRICT COURT'S ADOPTION OF THE STATE'S PROPOSED FINDINGS WAS PROPER

Appellant argues that the District Court's Findings of Fact, Conclusions of Law and Order ("Findings") should not be given deference because it was "a slightly revised version of the motion to dismiss and reply." Appellant's Opening Brief ("AOB") at 6-8. Specifically, he argues that the District Court erred by signing off on the State's proposed order without first providing the State with any guidance. AOB at 7-8.

Appellant's claim is meritless. Indeed, he raises this claim without ever challenging the District Court's Findings as a faulty adoption of the State's proposed order below. Appellant could have objected on any of the grounds he now raises pursuant to Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007). His failure to raise these complaints amounts to waiver and, thus, they are only reviewable, if at all, for plain error. Dermody, 113 Nev. at 210–11, 931 P.2d at 1357; Guy, 108

[9] In order to assist this Court in reviewing Appellant's claims, the State recognizes that the issues in this brief are interrelated and, thus, like Appellant, also incorporates every section of the pleading into every other section.

Nev. at 780, 839 P.2d at 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis, 107 Nev. at 606, 817 P.2d at 1173. Plain error review asks:

> To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan v. State, 131 Nev. 43, 49, 343 P.3d 590, 594 (2015).

Regardless of the standard of review employed, the District Court did not err when it issued its Findings. Indeed, Appellant's claims are not only meritless, but they are also belied by the record as well as by Nevada and United States Supreme Court precedent.

The Eighth Judicial District Court rules require the prevailing party to furnish the written order. EDCR 7.21. "The counsel obtaining any order, judgment or decree shall furnish the form of the same[.]" DCR 21. Such proposed findings must "accurately reflect[] the district court's findings." Byford, 123 Nev. at 69, 156 P.3d at 692. However, a court may reject objections to proposed findings that are belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Here, on May 4, 2020, the District Court rendered its decision as to Appellant's Sixth Petition via minute order. In such minute order, the District Court

explained that pursuant to the Eighth Judicial District Court's Administrative Order 20-01, it would take the matter under advisement and render a decision based on the pleadings submitted. The district court's decision was as follows:

> Petitioner has failed to establish sufficient good cause to overcome the procedural bars to his 6th Petition. See, NRS 34.726 and 34.800, 34.810. Also, see Order of Affirmance filed July 30, 2014. Petitioner has failed to justify why he waited so long to challenge the New York conviction. The time bars in this matter did not commence when the New York conviction was overturned for technical reasons (no finding of actual innocence or constitutional infirmity) but when Petitioner could have acted with due diligence and sought to overturn the conviction. When Petitioner absconded during his New York trial in 1983 he knew he had not been sentenced and could have attacked the New York conviction when he was sentenced in the present case.
>
> The Court adopts the State's procedural history.
>
> Therefore, Court ORDERED, Petition DENIED. State to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and to distribute a filed copy to all parties involved pursuant to EDCR 7.21.

II AA 465-66. Accordingly, the State drafted its proposed finding consistent with this minute order.

No judge wants findings that are incomplete, weak, or inadequate. To this end, the State's proposed findings included all rulings necessary for final disposition of Appellant's Sixth Petition in accord with the district court's rulings, regardless of whether they were specifically mentioned in the oral pronouncement.

The prevailing party is not limited to the transcript of oral pronouncement of a ruling when drafting proposed findings. To the contrary, the court need only orally

pronounce its decision "with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order." Byford, 123 Nev. at 70, 156 P.3d at 693; State v. Greene, 129 Nev. 559, 565, 307 P.3d 322, 325-326 (2013). This Court recently reiterated that "[i]t is common practice for Clark County district courts to direct the prevailing party to draft the court's order." King v. St. Clair, 134 Nev. 137, 142, 414 P.3d 314, 318 (2018) (quoting EDCR 1.90(a)(5) ("[A] judge or other judicial officer shall order the prevailing party to prepare a written judgment and findings of fact and conclusions of law")). Moreover, this Court has concluded that proposed orders that contain findings and conclusions beyond what is made in a court's oral pronouncement may still be valid, especially when a defendant has an opportunity to appeal any errors in the court's written order. See Smith v. State, 2019 WL 295686, Docket No. 74373 (unpublished) (Jan. 17, 2019); Zakouto v. State, 2018 WL 5734375, Docket No. 73489 (unpublished) (Oct. 11, 2018).

Additionally, Appellant's citations to federal authority are also misleading. AOB at 8. Appellant cites Anderson v. Bessemer City, 470 U.S. 564, 572, 105 S. Ct. 1504, 1510-11 (1985), Bright v. Westmoreland Cty., 380 F.3d 729, 732 (3d Cir. 2004), to support his claim. However, these cases are inapposite. In Anderson, while the Court did express criticism for verbatim adoptions of findings of fact prepared by the parties, due in part to "the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed

that the judge has decided in their favor," Appellant neglects to mention that Anderson also noted that on appeal, "… *even when the trial judge adopts proposed findings verbatim*, the findings are those of the court and may be reversed *only if clearly erroneous*." Anderson, 470 U.S. at 572, 105 S. Ct. at 1510-1511 (citing Marine Bancorporation, Inc., 418 U.S. at 615 n.13, 94 S. Ct. at 2866, and El Paso Natural Gas Co., 376 U.S. at 656-57 & n.4, 84 S. Ct. at 1047 & n.4) (emphasis added). "If the district court's account of the evidence is plausible *in light of the record viewed in its entirety*, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Id. at 573-574, 105 S. Ct. at 1511 (emphasis added). While the lack of sufficient judicial guidance might be grounds for a more stringent appellate review, it is not grounds for reversal. Id. There is no error where there is no reason to doubt that the findings issued by the district court represent the judge's own considered conclusions. Id. Likewise, in Bright, 380 F.3d at 731, while the United States Court of Appeals provided policy reasons for why it does not favor a court adopting a party's findings, it also echoed Anderson for the proposition that "proposed *findings of fact and conclusions of law* supplied by prevailing parties after a bench trial, although disapproved of, is not in and of itself reason for reversal."

While the State does not discount that this is a capital case, the record reflects that the Findings signed by the District Court accurately reflect the Court's intention

and were deliberately adopted after the exercise of independent judgment. This is not a case in which the Court did not give Appellant notice of what the ruling was. This is not a case where the State took control of the Court's power. The District Court did not conduct an ex parte hearing of any kind. The Court reviewed the pleadings of both parties. The District Court signed the State's proposed order because it was in compliance with the administration of justice in this case, not solely because the State proposed it.

The District Court acted alone when it signed the State's Order. The State did not hold the pen for the District Court when he reviewed and signed the Findings. The State did not demand that it be filed. The State did not ask the District Court if it could propose the findings. The District Court directed that the State draft findings "consistent with" its minute order. II AA 465-66. As such, the District Court's adoption of the proposed findings was not clearly erroneous.

Unless this Court is prepared to say that the District Court failed to exercise independent judgment in denying Appellant's Sixth Petition, there is no error in the verbatim adoption of proposed findings consistent with the arguments and pleadings.[10] Even then, the remedy would only be heightened scrutiny of the

[10] To the extent Appellant cites California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446 (1983), to support the proposition that a death sentence requires a "greater degree of scrutiny of the capital sentencing determination," he has not indicated how this reconciles with Nevada's standard of review for this claim. Regardless, it is clear

Findings on appeal. Drafting proposed findings places a substantial burden on the State, and while the State would have no opposition to the District Court drafting its own findings, the appropriate venue for such a discussion would be an attempt to modify DCR 21 and EDCR 7.21.

II. APPELLANT'S SIXTH PETITION WAS PROCEDURALLY BARRED

The Court gives deference to a district court's factual findings in habeas matters but reviews the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert denied, 133 S. Ct. 988 (2013). Additionally, This Court reviews for abuse of discretion a district court's denial of a habeas petition without the benefit of an evidentiary hearing. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008).

A. Appellant's Sixth Petition is Time-barred

The district court properly determined that Appellant's Sixth was time-barred. NRS 34.726(1) states that "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 Supreme Court issues its remittitur." The one-year time bar is strictly construed and enforced. Gonzales, 118 Nev. 590, 53 P.3d 901.

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from the district court's extensive Findings that it thoroughly reviewed Appellant's claim.

The Nevada Supreme Court has held that the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). For cases that arose before NRS 34.726 took effect on January 1, 1993, the deadline for filing a petition extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

Remittitur issued from Appellant's direct appeal on February 12, 1988. Therefore, Appellant had until January 1, 1994, to file a timely habeas petition. Appellant filed his Sixth Petition on September 4, 2018. I AA 1-21. Appellant was therefore over twenty-four (24) years too late. As such, the District Court properly found the Sixth Petition was time barred.

B. Application of the Procedural Bars is Mandatory

The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the District Courts have a *duty* to consider whether post-conviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). This Court has found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

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

Id., at 231, 112 P.3d at 1074. Additionally, this Court held that procedural bars "cannot be ignored when properly raised by the State." Id., at 233, 112 P.3d at 1075. This Court granted no discretion to the district courts regarding whether to apply the statutory procedural bars.

C. Appellant's Sixth Petition is barred by Laches

Appellant argues that his Sixth Petition should not have been dismissed based on laches. AOB at 21-23. However, the district court properly found that Appellant's Sixth Petition was barred by the doctrine of laches. III AA 511-12.

NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing 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." See also, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice

system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.").

In this case, the District Court properly found that the State would have been prejudiced in responding to the petition or in retrial. III AA 511-12. To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2). In this case, the State did just that. The State argued that more than five (5) years had passed since remittitur issued from Appellant's direct appeal on February 12, 1988. Indeed, over thirty (30) years had passed since Appellant's direct appeal was final. As such, the District Court properly found that the State pled statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1) against the Sixth Petition. The District Court accurately determined that, after such a passage of time, the State was prejudiced in its ability to answer the Sixth Petition and retry the penalty-phase. If Appellant's sixth go around on state post-conviction review was not dismissed nor denied on the procedural bars, the State would have been forced to track down witnesses who might have died or retired in order to prove a case that is several decades old. Assuming witnesses would be available, their memories would have certainly faded and they would not present to a jury the same way they did in 1983. Accordingly, the District Court accurately concluded that Petitioner's Sixth Petition was also barred based on laches.

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D. Appellant's Sixth Petition was Properly Barred Based on Waiver Grounds and as an Abuse of the Writ

Appellant argues that NRS 34.810 does not apply because his good cause claim is both "alleg[ing] a new or different ground[]" for relief and it is not an abuse of the writ because Appellant could not have raised his claim until the New York Court issued its order vacating his conviction. AOB at 19-21; I AA 17-21. Despite Appellant's creative argument, the District Court properly found that Appellant's sixth attempt at state habeas relief had to be dismissed on waiver grounds as well as an abuse of the writ. III AA 512-13.

Claims that could have been raised on direct appeal or in a prior petition are barred under NRS 34.810(1)(b):

> The court *shall dismiss* a petition if the court determines that:
> …
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) *Raised in a direct appeal or a prior petition* for a writ of habeas corpus or post-conviction relief, *unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner*.

(emphasis added). The failure to raise grounds for relief at the first opportunity is an abuse of the writ:

> 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.*

NRS 34.810(2) (emphasis added).

Moreover, Nevada law dictates that all claims appropriate for direct appeal must be pursued on direct appeal or they will be "considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). This Court has emphasized that: "[a] court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added). Where a claim arises after direct appeal, a petitioner has one (1) year in which to file a petition alleging the claim or it too is barred. Rippo v. State, 134 Nev. 411, 412, 423 P.3d 1084, 1090 (2018) ("[A] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur.").

The District Court accurately determined that Appellant's challenge to the prior violent felony aggravating circumstance was barred by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ. III AA 513. Appellant

attempts to argue that he could not have raised a good cause claim regarding his New York conviction until it was rendered in May 2018. However, what Appellant fails to mention is that he has been aware for decades that he was not sentenced in his New York robbery case, including during trial. No matter how Appellant wants to frame his argument, Appellant could have and should have raised that issue with the New York courts decades ago. To wait decades in order to secure a favorable result in a New York collateral proceeding in order to raise a challenge to his death sentence thirty (30) years after the fact is an abuse of the writ.

Moreover, Appellant's attempt to somehow disguise his new claim as an old claim is misleading. Indeed, as the District Court noted, "[Appellant] challenged the prior violent aggravating circumstance based on the lack of sentence in his New York case in 2007 during the litigation of his fourth petition." III AA 517. This Court in fact denied Appellant's claim that he was not convicted of robbery in New York. Here, Appellant is still claiming that he was not convicted of robbery. See Howard v. State of Nevada, 2014 WL 3784121, Docket No. 57469, (unpublished) (July 30, 2014). His claim is based on the very same subject matter and is therefore successive. NRS 34.810(2). Accordingly, Appellant's claim is covered by NRS 34.810.

Likewise, Appellant's claim is barred by the doctrine of res judicata. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975)

(quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

III. APPELLANT CANNOT DEMONSTRATE GOOD CAUSE, PREJUDICE, OR ACTUAL INNOCENCE TO OVERCOME THE PROCEDURAL BARS

A. Appellant Has Failed to Demonstrate Good Cause

Appellant argues that he has demonstrated good cause to overcome the procedural bars. AOB at 9-16. Specifically, he claims that the basis for good cause is the result of New York invalidating his robbery conviction, which he could not have raised as a basis for good cause until May 22, 2018, when the Queens County Supreme Court rendered such decision. AOB at 9. Consequently, because he filed the instant Sixth Petition on September 4, 2018, he argues that the District Court should have found that his petition was timely. AOB at 10. Despite Appellant's argument, the District Court properly determined that Appellant failed to prove good cause, prejudice, and actual innocence to overcome the procedural bars of his Sixth Petition.

To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). To establish prejudice "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." Huebler, 128 Nev. at 197, 275 P.3d at 94-95 (2012), cert. denied, 568 U.S. 1147, 133 S.Ct. 988 (2013).

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003), rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004); see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules"); Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician's declaration in support of a habeas petition were sufficient "good cause" to overcome a procedural default, whereas a finding by Supreme Court that a defendant was suffering from Multiple Personality Disorder was). An external impediment could

be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting, Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

This Court has concluded that, "appellants cannot attempt to manufacture good cause[.]" Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting, Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), superseded by statute as recognized by, Huebler, 128 Nev. at __, 275 P.3d at 95, footnote 2). Excuses such as the lack of assistance of counsel when preparing a petition as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. Phelps v. Dir. Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute as recognized by, Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Even when a petitioner cannot show good cause sufficient to overcome the procedural bars, habeas relief may still be granted if he can demonstrate a fundamental miscarriage of justice. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. In order to prove a fundamental miscarriage of justice, a petitioner must make "a

colorable showing he is actually innocent of the crime or is ineligible for the death penalty." Id. (citation omitted). Actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. However, "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995) (emphasis added).

Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Id.; Pellegrini, 117 Nev. at 876, 34 P.3d at 530. The Eighth Circuit Court of Appeals has "rejected free-standing claims of actual innocence as a basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)). A defendant claiming actual innocence must demonstrate that it is more likely than not

that no reasonable juror would have convicted him absent a constitutional violation. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Once a defendant has made such a showing, he may then use the claim of actual innocence as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Schlup, 513 U.S. at 315, 115 S. Ct. at 861. Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Id. at 316, 115 S.Ct. at 861.

"Where the petitioner has argued that the procedural default should be ignored because he is actually ineligible for the death penalty, he must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. To establish innocence of capital punishment sufficient to waive a procedural default, a petitioner must eliminate every aggravating circumstance. Sawyer v. Whitley, 505 U.S. 333, 347, 112 S.Ct. 1514, 2523 (1992). In addition, any new evidence regarding mitigating factors is not considered in an "actual innocence" death eligibility determination. Sawyer, 505 U.S. at 345-346, 112 S.Ct. at 2522. Notably, the "actual innocence" requirement focuses exclusively on those elements that render a defendant eligible for the death penalty; any additional mitigating evidence that was not presented at trial – even if it was the result of alleged constitutional errors – is

irrelevant and will not be considered in an actual innocence determination. Id. at 347-48, at 2523-24.

No matter how Appellant attempts to frame the issue or how many times he attempts to argue it, the District Court did not err in finding that he failed to demonstrate good cause. Appellant repeats throughout his brief that his time-bar clock was reinitiated when the New York Court vacated his robbery conviction. However, what Appellant fails to mention is that he knew he had not been sentenced on the New York robbery conviction since his trial. Accordingly, the District Court properly determined that the New York Court's decision to vacate Appellant's robbery conviction did not change the fact that he could not have more time to pursue a claim he knew about for thirty (30) years. In other words, the fact that Appellant had finally gotten around to challenging his New York conviction after thirty (30) years does not amount to good cause to ignore NRS 34.726, NRS 34.800 and NRS 34.810. Indeed, it bears noting that Appellant provided nothing in the record below establishing how his New York conviction was invalidated or when he began such a process. Accordingly, Appellant's attempt to argue that his claim provides a "clear picture" is misleading and his claim that the New York court's decision provided him good cause is illogical.

Accordingly, the District Court properly found Appellant's reliance upon Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981 (1988), below was misplaced.

Johnson does not justify ignoring Appellant's procedural defaults. The United States Supreme Court held that it could reach the merits of Johnson's claim because "we cannot conclude that the procedural bar relied on by the Mississippi Supreme Court in this case has been consistently or regularly applied. Consequently, under federal law it is not an adequate and independent state ground[.]" Id. at 588-89, 108 S.Ct. at 1988. Appellant does not even contend that Nevada's procedural bars are not consistently applied. His failure to do so is an admission that he cannot make such a showing. See, Polk v. State, 126 Nev. 180, 184-86, 233 P.3d 357, 360-61 (2010). Nor can he, even the Ninth Circuit Court of Appeals admits that Nevada strictly enforces NRS 34.726(1). Loveland v. Hatcher, 231 F.3d 640, 642-43 (9th Cir. 2000). Indeed, the Federal District Court for Nevada has ruled in Appellant's federal habeas litigation arising from this case that Nevada consistently enforces NRS 34.726(1). Howard v. McDaniel, 2008 U.S. Dist. LEXIS 5191, p. 8-22 (D. Nev. 2008). Regardless, this Court steadfastly maintains that it consistently enforces Nevada's procedural default rules. Riker, 121 Nev. at 235-42, 112 P.3d at 1077-82.

Thus, Johnson is irrelevant unless Petitioner can evade NRS 34.726(1), NRS 34.800, and NRS 34.810. To ignore the procedural bars Appellant must establish "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (quoting, Murray v. Carrier, 477 U.S. 478, 488, 106

S.Ct. 2639, 2645 (1986)). Appellant cannot make this showing because he has been aware of the defective nature of his New York conviction for decades and did nothing about it. Appellant knew from the time of trial that he absconded from New York after his trial had started. I AA 210. Appellant challenged the prior violent felony aggravating circumstance based on the lack of a sentence in his New York case in 2007 during the litigation of his fourth petition. I Respondent's Appendix ("RA") 45-49. The District Court found the claim barred pursuant to NRS 34.726(1), NRS 34.800, and NRS 34.810. I RA 156-58. This Court ruled that Appellant could not justify ignoring his procedural defaults. Id. at 27-33. On appeal from denial of habeas relief, this Court agreed that the petition was procedurally barred and that Appellant could not overcome his defaults. Order of Affirmance, Docket No. 57469, filed July 30, 2014, at 2-3, 10-12.

Appellant further takes issue with the cases the District Court cited and argues they do not support the District Court's reasoning that Appellant's claim was available sooner. AOB at 11-12. However, Appellant is mistaken. Appellant claims that unlike the appellants in Hathaway and Pellegrini, the facts underlying the claims discussed in those cases were available to the defendant prior to the statute of limitations, or the time-bar from expiring. However, that is not true. In fact, as the District Court reiterated time and time again below, Appellant was aware that the was not sentenced on the New York conviction, the fact that the New York Court

vacated his conviction has no bearing on the availability of his claim as he knew he was never sentenced on the charge.

Appellant then argues that the District Court instead should have relied on Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 269 (2006), and State v. Boston, 131 Nev. 981, 363 P.3d 453 (2015), because they instead hone in on cases in which good cause was determined by a change in law. AOB at 12-14. More specifically, he argues that this Court has concluded claims are timely when they are brought within a year of favorable precedent appearing. AOB at 12-13. However, in making this argument, Appellant once again attempts to entice this Court into believing that the District Court was focused on the fact that Appellant had brought his actual innocence claim in the past, rather than the District Court's additional discussion of Appellant lacking good cause because he had known about his conviction for thirty (30) years.

In Bejarano, 122 Nev. at 1074, 146 P.3d at 270, this Court excused mandatory procedural defaults based on a petitioner's newfound claim based on good cause. Specifically, the Court concluded that the petitioner could demonstrate good cause because his claim was not reasonably available until the publication of the new case law. Id. Similarly, in Boston, 131 Nev. at 984-85, 363 P.3d at 455, this Court concluded there was good cause to overcome the procedural bars to a petition based on a previously unavailable legal basis. As Appellant concedes, both of these cases

involved good cause based on newly rendered legal decisions. These cases did not involve a situation in which the petitioner essentially blamed a district court for not finding good cause when he finally decided to bring a claim that had been available for thirty (30) years as is the case here. Accordingly, despite Appellant's argument to the contrary, Bejarano and Boston are not instructive for the present case.

Additionally, Appellant's argument that the District Court improperly relied on "inapposite" U.S. Supreme Court case law because it could not find supportive Nevada law to justify its decision is misleading. Indeed, it is clear that the District Court merely relied on such case law to show its similarities to Nevada authority and to demonstrate the purpose behind the procedural time bars—to compel habeas petitioners to pursue their claims expeditiously— and how Appellant violated that purpose. According to the United States Supreme Court, "the purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence … depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims[.]" Williams v. Taylor, 529 U.S. 420, 434-435, 120 S.Ct. 1479, 1490 (2000).[11] Indeed, the High Court has explicitly stated "that 'cause' under the cause

[11] Appellant argues that the District Court failed to cite cases that require an appellant to show due diligence in an actual innocence claim. AOB at 32-33. As is clear from the cases the District Court cited, in order for Appellant to establish good cause, he must show diligence.

and prejudice test must be something external to the petitioner, *something that cannot be fairly attributed to him.*" Coleman v. Thompson, 501 U.S. 722, 753, 111 S.Ct. 2546, 2566 (1991) (emphasis added). Similar to the procedural bars at issue in Williams and Coleman, Nevada also requires a habeas petitioner to demonstrate a lack of fault. NRS 34.726(1)(a) ("good cause for delay exists if the petitioner demonstrates … [t]hat the delay was not the fault of the petitioner"); NRS 34.800(1)(a) ("A petition may be dismissed … unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence"). Here, Appellant did not pursue his claim regarding his New York conviction for three (3) decades. This is an obvious failure of diligence that squarely falls on Appellant's shoulders. Appellant's failure to address his lack of diligence amounts to an admission that he cannot establish good cause. Polk, 126 Nev. at 184-86, 233 P.3d at 360-61.

Moreover, despite Appellant's attempt to split hairs, the District Court's reliance on estoppel principles was proper and appropriately determined that Witter was indistinguishable from Appellant's case. III AA 518-520; AOB at 14-16. In Witter v. State, 135 Nev. 412, 413–14, 452 P.3d 406, 408 (2019), this Court addressed an appellant contending that "because of the indeterminate restitution provision in the 1995 judgment, his conviction was not final until entry of the third amended judgment of conviction in 2017" and that as a consequence, "the direct

appeal decided in 1996 and the subsequent postconviction proceedings were null and void for lack of jurisdiction and therefore he should be allowed to raise any issues stemming from the 1995 trial [.]" The Court rejected this view and concluded that Witter's appeal was "limited in scope to issues stemming from the amendment." Id. at 412–13, 452 P.3d at 407. The Court gave two (2) reasons for this holding. Id. The Court noted that the more important of those was that "Witter treated the 1995 judgment of conviction as final for more than two decades, litigating a direct appeal and various postconviction proceedings in state and federal court." Id.

In distinguishing its precedents overturning judgments of conviction containing indeterminate restitution amounts from Witter's situation, the Court noted that the defendants in those cases "raised the error regarding the indeterminate restitution provision during the first proceeding in which they challenged the validity of their judgments of conviction[.]" Id. at 415, 453 P.3d at 409. Witter's failure to do the same implicated the compelling consideration of finality. Id. The Court pointed out that "[a] challenge to a conviction made years after the conviction is a burden on the parties and the courts because '[m]emories of the crime may diminish and become attenuated,' and the record may not be sufficiently preserved." Id. (quoting, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984)). Ultimately, "Witter treated the judgment of conviction as a final judgment. He is estopped from now arguing that the judgment was not final and that the subsequent

proceedings were null and void for lack of jurisdiction." Id. at 416, 453 P.3d at 410 (footnote omitted).

Despite Appellant's argument to the contrary, Witter's failure to exercise due diligence in challenging his judgment of conviction is indistinguishable from Appellant's failure of diligence in attacking his New York conviction. In challenging the district court's decision, Appellant attempts to draw a distinction between Appellant's Nevada case and New York case to say that by Appellant challenging the Nevada case, he was only treating the Nevada case as final. While attempting to draw such a distinction, Appellant misleadingly argues that Appellant never made any mention of the New York case while challenging his Nevada sentence. That is false. Appellant treated his New York conviction as final for nearly four (4) decades. He filed petition after petition and appeal after appeal all treating his New York conviction as final. Should this Court construe Witter even more narrowly than the District Court, at the bare minimum as discussed *supra*, "[Appellant] challenged the prior violent aggravating circumstance based on the lack of sentence in his New York case in 2007 during the litigation of his fourth petition." III AA 517. Thus, just as in Witter, Appellant should be estopped from only now alleging that his New York conviction is null and void.

The District Court properly found that the requirement of due diligence is fundamental in Nevada habeas law. Nevada's statutory laches provision requires a

petitioner to demonstrate reasonable diligence in order to avoid a dismissal. NRS 34.800(1)(a) ("A petition may be dismissed if delay in the filing of the petition … [p]rejudices the respondent … in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred"). The time bar of NRS 34.726 may only be waived if a petitioner demonstrates that "the delay is not the fault of the petitioner[.]" NRS 34.726(1)(a). The bar against successive and abusive petitions may be waived upon a showing of "[g]ood cause for the failure to present the claim or for presenting the claim again[.]" NRS 34.810(3)(a). Notably, the Nevada Legislature just last session extended the necessity of demonstrating due diligence to claims of factual innocence. NRS 34.960(3)(a) ("… the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence").[12]

[12] Federal law appears to diverge from Nevada law on this point. Federal law does not preclude a claim of actual innocence for failing to exercise due diligence; instead, "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing" and on the credibility of a claim. McQuiggin v. Perkins, 569 U.S. 383, 399, 133 S. Ct. 1924, 1935, 185 L. Ed. 2d 1019 (2013). However, McQuiggin is limited to federal post-conviction relief and does not apply to state habeas proceedings. Com. v. Brown, 2016 PA Super 148, 143 A.3d 418, 420–21 (2016) ("While McQuiggin represents a further development in federal habeas corpus law, as was the case in Saunders, this change in federal law is irrelevant to the time restrictions of our PCRA"); State v. Edwards, 164 So.3d 823, 823-24 (La. 2015) ("McQuiggin does not purport to govern state post-conviction

B. Appellant Has Failed to Demonstrate Prejudice[13]

Appellant claims that the District Court improperly found he was not actually innocent of the death penalty and, moreover, he was prejudiced by way of the New York Court vacating his final aggravator for his death sentence. AOB at 16-19, 23-35. Additionally, he claims that regardless of whether this Court agrees with the District Court's decision, Appellant was prejudiced because of the State's references that Appellant had been convicted. AOB at 17. However, despite Appellant's argument, the District Court accurately found that Appellant had failed to demonstrate and overcome the procedural bars by claiming that he was actually innocent of the death penalty. Moreover, regardless of any argument Appellant

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proceedings conducted under state law"); Wayne v. State, 866 N.W.2d 917, 919 (Minn. 2015) ("McQuiggin's holding specifically applies to federal habeas petitions and … does not apply to a postconviction motion that is a creature of state statute … and is governed by its own statutory time bar"); Ex parte Smith, No. 03-17-00628-CR, 2018 WL 2347012, at *3 (Tex. App. May 24, 2018), petition for discretionary review refused (July 25, 2018) ("Smith relies on … McQuiggin … [but] failed to show that the law on federal habeas claims applies to his habeas claim under Texas law"). Further, this Court has declined to import other similar equitable remedies from federal habeas law. Brown v. McDaniel, 130 Nev. 565, 569-76, 331 P.3d 867, 870-75 (2014). Regardless, even if applicable McQuiggin would not assist Appellant since it was published decades after Appellant's conviction and there is no indication that the case applies retroactively. See, Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989); Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002).

[13] For purposes of clarity and to assist in the Court's review of this matter, the State has elected to address Appellant's arguments regarding prejudice, actual innocence, and the merits of his petition, which he separated into three (3) separate sections, within the same section.

attempted to make, his inaction for (30) years is what caused any prejudice in this case.

"Where … a petitioner cannot demonstrate cause and prejudice, the district court may nevertheless excuse a procedural bar if the petitioner demonstrates that failing to consider the merits of any constitutional claim would result in a fundamental miscarriage of justice." Rippo, 134 Nev. at 444, 423 P.3d at 1112 (citing, Pellegrini, 117 Nev. at 887, 34 P.3d at 537). Specifically, where a petitioner alleges ineligibility for the death penalty he must show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

Initially, the District Court properly found that Appellant's claims of actual innocence should be summarily denied since, even if one could assume that factual innocence has been established based on the invalidation of his New York conviction, he still has not identified a constitutional violation related to the New York conviction. Schlup, 513 U.S. at 315, 115 S. Ct. at 861. To the extent that Appellant argues that his actual innocence claim amounts to cruel and unusual punishment it should be summarily denied without a showing of good cause for the same reason his other claims are barred.

Appellant cites to Lisle v. State, 131 Nev. 356, 351 P.3d 725 (2015), to argue that Nevada has adopted the federal bar allowance for constitutional claims to be

used as a "gateway" to overcome the bar on such claims. However, Appellant has strategically omitted what this Court actually concluded based on federal precedent. In Lisle, the petitioner presented two (2) grounds for his actual innocence claim: (1) there was insufficient evidence for the only aggravating circumstance and (2) had the jury been presented with his new mitigation evidence, he would not have received a death sentence. Id. at 362, 351 P.3d at 730. After concluding that his first ground was meritless because the petitioner had not presented new evidence regarding his only aggravator, the Court reviewed his second ground with the sole issue being: "can a claim of actual innocence of the death penalty offered as a gateway to reach a procedurally defaulted claim be based on a showing of new evidence of mitigating circumstances?" Id. at 363, 351 P.3d at 730. On this narrow issue, this Court concluded:

> Although we are not bound by the United States Supreme Court's decisions in interpreting state law, see Bradshaw v. Richey, 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005) (reiterating the converse, that "a state court's interpretation of state law ... binds a federal court sitting in habeas corpus"), we find persuasive the Supreme Court's reasoning with its focus on the objective factors that narrow the class of offenders subject to the death penalty because that focus ensures rational reviewability and restrains the actual-innocence inquiry as a narrow gateway through which a petitioner may obtain review of claims that otherwise would be procedurally defaulted. We therefore conclude that an actual-innocence inquiry in Nevada must focus on the objective factors that make a defendant eligible for the death penalty, that is, the objective factors that narrow the class of defendants for whom death may be imposed.

Id. at 367–68, 351 P.3d at 734. Moreover, the Court explained that it did not wish to "open[] the actual-innocence gateway to include new mitigating evidence, for otherwise the exception would swallow the procedural defaults adopted by the Legislature." Id. at 363, 351 P.3d at 731. Thus, Appellant's reliance on Lisle does not imply that this Court has adopted federal bar principles in the context of Appellant's claim involving aggravators, let alone the principles governing cruel and unusual punishment. Indeed, the Lisle Court was instead focused on evidence of new mitigators in such case. Accordingly, Appellant has failed to provide any Nevada authority that suggests the expansion of Nevada's bar vis a vis the federal bar in regard Appellant's cruel and unusual punishment claim. His failure to do so should be fatal to his contention. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Even assuming this Court wished to entirely adopt federal procedural bar principles, a point the State does not concede, Appellant would still have failed to demonstrate that his claim overcomes the procedural bars under such standard. In Schlup, the United States Supreme Court compared Schlup's claim brought under the purview of an unfair trial with the claim the defendant in Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993), raised which did not involve an unfair trial. Schlup, 513 U.S. at 315, 115 S. Ct. at 861. The Schlup Court explained:

> If there were no question about the fairness of the criminal trial, a Herrera–type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup's innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims.

Id. at 317, 115 S. Ct. at 862. Accordingly, Appellant's attempt to liken Appellant's claim to Schlup is meritless. Indeed, Appellant's claim is more akin to Herrera as he is not claiming any additional error at his trial. Under the Herrera analysis discussed in Schlup his claim would fail because he cannot demonstrate "new facts [that] unquestionably establish [his] innocence." Id. Indeed, not only has Appellant failed to demonstrate that he is presenting a new claim, but also Appellant's New York conviction was valid at the time of his sentence and thus he cannot establish that a constitutional violation existed at the time of sentencing. See Clem, 119 Nev. at 621-26, 81 P.3d at 526-29 (judicial interpretation of a statute after conviction such that the petitioner could not have been guilty of the deadly weapon enhancement does not amount to a constitutional violation for purposes of actual innocence since the petitioner was guilty under the law as it existed to the time of conviction).[14]

[14] To the extent Appellant challenges the District Court's use of Clem, his argument is meritless. Appellant has failed to demonstrate how a change in Appellant's New York robbery charge does not coincide with a change in law which is the very issue Clem centered on. 119 Nev. at 623, 81 P.3d at 527 ("[a] change of law does not

Additionally, the District Court properly determined that summary denial of Appellant's actual innocence claim is additionally warranted by his failure to establish factual innocence as opposed to a legal defect in his New York conviction. Despite Appellant's argument to the contrary, actual innocence means factual innocence not mere legal insufficiency. Bousley, 523 U.S. at 623, 118 S.Ct. at 1611; Sawyer, 505 U.S. at 338-39, 112 S.Ct. at 2518-19. As such, Appellant's actual innocence claim must fail since he secured reversal of his New York conviction on an issue of legal sufficiency and not factual innocence.

Moreover, Appellant cannot demonstrate "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. He cannot meet this standard because his jury found the prior violent felony aggravating circumstance based on the testimony of the victim from that prior violent crime and not purely on New York documentation of that conviction. It is important to note that in the only authority proffered by Appellant below, the United States Supreme Court premised its holding upon the fact that:

> The sole evidence supporting the aggravating circumstance that petitioner had been "previously convicted of a felony involving the use or threat of violence to the person of another" consisted of an authenticated copy of petitioner's commitment to Elmira Reception Center in 1963 following his conviction in Monroe County, New York,

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invalidate a conviction obtained under an earlier law."), citing Kleve v. Hill, 243 F.3d 1149, 1151 (9th Cir. 2001).

> for the crime of second-degree assault with intent to commit first-degree rape.

Johnson, 486 U.S. at 581, 108 S. Ct. at 1984. Despite Appellant's attempts to distinguish the instant case, the District Court properly found that Johnson was factually distinguishable from this case because the victim from Appellant's prior violent felony testified at the penalty hearing about her victimization by Appellant. II AA 287–304. Additionally, a New York detective testified regarding his investigation of the prior violent felony. II AA 304–315.

This is significant because the presentation of the underlying facts from those who experienced them allowed the jury to make an independent judgment about whether Appellant committed a prior violent felony instead of merely relying upon court records. This distinction was key in Gardner v. State, 297 Ark. 541, 764 S.W.2d 416 (Ark. 1989). The Supreme Court of Arkansas faced a habeas petitioner complaining "that the aggravating circumstance found to exist by the jury in the sentencing phase … has since been invalidated … because a conviction for a prior violent felony which formed the basis for the jury's finding of an aggravating circumstance … has since been reversed on appeal." Id. at 542, 764 S.W.2d at 417. Just as Appellant does here, Gardner argued that Johnson required the invalidation of his death sentence. Id. at 543-44, 764 S.W.2d at 418. The Supreme Court of Arkansas rejected this claim:

> In Johnson, the jury found the existence of three aggravating circumstances, one of which was that Johnson had been previously convicted of a felony involving the use or threat of violence to another person. The sole evidence of the prior felony was a document reflecting a conviction for assault to commit rape. The assault conviction was overturned on appeal after trial, and the United States Supreme Court concluded that since the assault conviction was invalid and the prosecutor had presented no evidence of the conduct underlying it, Johnson was entitled to be resentenced. Johnson is not applicable to petitioner's case because at petitioner's trial the jury heard detailed direct testimony by the victims of the prior violent felony and other evidence which established the nature of petitioner's conduct. In addition to their testimony, there was further evidence of the crimes against them introduced in the sentencing phase of petitioner's trial. The aggravating circumstance was thus proved by evidence adduced at trial of the commission of violent acts rather than by proof of a conviction, a practice which this court has upheld. See, Miller v. State, 280 Ark. 551, 660 S.W.2d 163 (1983).

Gardner, 297 Ark. At 544, 764 S.W.2d at 418.

Similarly, in Gibbs v. Johnson, 154 F.3d 253, 258 (5th Cir. 1998), cert. denied, 526 U.S. 1089, 119 S.Ct. 1501 (1999), the Fifth Circuit Court of Appeals faced a habeas petitioner contending that his death sentence was invalid under Johnson because "the state relied upon inaccurate evidence of a prior offense[.]" Gibbs premised his Johnson claim on an alleged Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), violation. Gibbs, 154 F.3d at 255-58. Specifically, the State presented evidence that Gibbs attacked another inmate but failed to disclose a jail report indicating that the incident was dismissed on self-defense grounds. Id. at 256. The Fifth Circuit denied habeas relief:

> We are not persuaded. In Johnson the invalidated conviction was the sole evidence of the prior conduct. The court in Johnson emphasized that because the prosecutor relied upon a judgment of conviction to prove the prior acts, the reversal took away the prosecutor's evidence. The evidence of Gibbs's prior acts was the testimony at trial of the victim.

Gibbs, 154 F.3d at 258.

The Eleventh Circuit has reached a similar conclusion. In Spivey v. Head, 207 F.3d 1263, 1269 (11th Cir. 2000), cert. denied, 531 U.S. 1053, 121 S.Ct. 660 (2000), a habeas petitioner argued that "his prior vacated conviction was relied on in sentencing thus violating his Eighth Amendment rights under Johnson[.]" The Eleventh Circuit recognized that in Johnson "[t]he prosecution introduced no evidence about the conduct underlying the prior conviction, but relied instead on a single authenticated copy of a document indicating the conviction[.]" Id. at 1281. Based on that, the Court rejected the petitioner's claim because "[i]n contrast to Johnson, here there is extensive evidence of the conduct underlying the Bibb County conviction[.]" Id.

Johnson is inapplicable to Appellant since the jury heard direct evidence of his prior violent crime. At the time of trial, the State argued that the jury needed to make its own independent judgment regarding the existence of the prior violent felony aggravating circumstance:

> Mr. Seaton: We are going to bring forward eye-witness testimony or testimony of these people who were down in San Bernardino and are

familiar with the crime and can tell the jury a little more about the factual circumstances underlying

The reason for that, and I'll just briefly elude to it here because it is counsel's argument at this time, but our reason for that is because the statute 175.554 causes the state to have the burden of proving these aggravating circumstances beyond a reasonable doubt. And in addition to that, that particular aggravating circumstance has to do with the use of force or violence. And the mere recitation of what the conviction was for is not, in the state's mind, adequate to comply with that burden of proof.

…

Mr. Seaton: The other act that we intend to bring forth has also been put into evidence and again by the Defendant's own admission, and that is the conviction in absente. In view of the robbery with a weapon of a nurse in Queens, New York, in 1978. …

…

Mr. Seaton: We have witnesses. We have the nurse here and the detective who worked the case. We would want to put them on as opposed to any documentation for the same reason, that is to show the jury beyond a reasonable doubt that the use of force and/or violence was used in the commission of that particular robbery.

…

And it's important that the State be able to show the jury the facts, and maybe that's the important thing here. The jury isn't deciding as much the fact of the conviction as they are what's the underlying facts of that conviction. What was it that the jury was able to consider in order for that jury to determine that there was a use or threat of violence? And those are the things that we wish to bring before the jury at this particular time.

II AA 276-77, 280.

Consistent with this position, the State presented testimony from the victim and the police detective who investigated the New York robbery. II AA 287-315. The State's argument to the jury on the prior violent felony aggravating circumstance was also consistent with this position. The State read out the instruction defining the prior violent felony aggravating circumstance and then extensively discussed the testimony related to the New York crime. II AA 402-04. Indeed, the State never presented the jury with a judgment of conviction in the New York case. Instead, jurors were only given court minutes from the New York case. II AA 312-13. Furthermore, the mere fact of the adjudication was not at issue since Appellant admitted the New York conviction. I AA 209-210.

After attacking the District Court's reliance on this applicable case law, Appellant cites to Armstrong v. State, 862 So. 2d 705 (Fla. 2003), to further support his argument that the District Court erred. In Armstrong, the court concluded that because a conviction used as an aggravator was vacated and because there was testimony about the conviction during the defendant's penalty phase, it could not conclude that any error was harmless. Id. at 718. Accordingly, the court required a new sentencing hearing. Id. at 715. However, Armstrong is completely distinguishable from this case as any prejudice was brought on by Appellant himself. Indeed, regardless of Appellant's argument that he was prejudiced because the State

and its witnesses used the word "conviction," any prejudice falls on his thirty (30) years of inaction.

The New York conviction was invalidated because "[s]ince 1980, the New York State authorities had actual knowledge that the defendant was arrested and in continued custody by both California and Nevada" and "[i]n 37 years, the People have not attempted to extradite the defendant to New York or make any other reasonable effort to produce the defendant for sentencing." I AA 18-19. The very words of the New York Court apply equally to Appellant. Just like New York, Appellant did nothing to enforce or protect his interests for over thirty (30) years. Just like New York, Appellant should not profit from his lack of due diligence. Thus, Appellant cannot establish good cause. As for actual innocence, Appellant's jury, who made an independent finding of the prior violent felony aggravating circumstance because it heard the facts of the New York case. That Appellant's New York conviction was invalidated on a technicality after more than thirty (30) years does nothing to undermine the factual truth of what he did to the victim in the New York case.

Therefore, Appellant's claim that the District Court did not "truly engage with the merits of [Appellant's] claim" in its order is misleading. In sum, the District Court spent approximately twelve (12) of its twenty-two (22) page order discussing Appellant's claim. AOB at 35. Additionally, the District Court relied on the

appropriate case law to reach its decision. Appellant's argument that the District Court improperly distinguished his case from Johnson is equally meritless as discussed *supra*. AOB at 35-44. Moreover, Appellant's argument that his sentence was cruel and unusual punishment, as discussed *supra*, under Nevada's prohibition against cruel and unusual punishment is meritless.

Should this Court disagree with the District Court's order finding a lack of good cause, the appropriate remedy would be an evidentiary hearing to explore why Appellant took thirty (30) years to begin pursuing that his New York robbery conviction be vacated and when exactly he began such pursuit.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the Sixth Petition.

Dated this 25th day of August, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital 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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the page and type-volume limitations of NRAP 32(a)(7)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 18,243 words and does not exceed 80 pages.
3. **Finally, I hereby certify** that I have read this appellate 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 25th day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 25, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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