IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

DARION COLEMAN Appellant, vs. STATE OF NEVADA, Respondent.	Case No: 82915

APPELLANT'S REPLY BRIEF

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A. LEGAL ARGUMENT

a. The district court's reasonably exercised discretion must not be overturned, given both the state's acquiescence to the stipulation, and good cause justifying filing of the Petition beyond the statutory deadline.

NRS 34.726 (1) allows a Court to extend the time allowed to file a post-conviction Petition for relief based on good cause, so long as the Petitioner shows both that "the delay is not the fault of the petitioner; and that dismissal of the petition as untimely will unduly prejudice the petitioner. To show good cause, a Petitioner must demonstrate that an impediment external to the defense prevented him or her from complying with the rules. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 508 (2003). In "terms of a procedural time-bar, an adequate allegation of good cause would sufficiently explain why a petition was filed beyond the statutory time period." *Harris v. State*, 133 Nev. 683, 687, 407 P.3d 348, 352 (Nev. App. 2017) (quoting *Hathaway v. State*, 119 Nev. 248,252, 71 P.3d 503 (2003). Indeed, the purpose of such time bars is to limit habeas petitioners to one time through the post-conviction system absent extraordinary circumstances. *Pellegrini v. State*, 117 Nev. 860, 875, 34 P.3d 519 (2001).

Here, the district court properly analyzed good cause under NRS 34.726 (1), and reasonably exercised its discretion. 4 AA 761. After reviewing the state's argument concerning good cause in its Opposition, and the same in the Petitioner's

Reply, the district court granted Appellant the ability to have his Petition heard on the merits. 4 AA 803-04. At the hearing on the Petition, the state acknowledged both that it was not comfortable arguing that good cause did not exist given the prior stipulation, *after considering that the stipulation was not legally valid,* and noted that it would submit on the arguments in the Opposition despite not finding them particularly persuasive. 4 AA 803-04 (emphasis added). It is also incorrect when Respondent claims that the stipulated Petition deadline was missed. *RAB* at 13. Certainly, if the state felt the agreed to deadline was missed, this would have been a component of either the Opposition or oral argument.

Additionally, the Reply in this matter, which was filed on April 17, 2020, specifically argued good cause and its legal reasons. 4 AA 751-52. Altogether, this shows that the district court did not fail to conduct the analysis as indicated by the state, but rather that the district court found good cause after evaluating the procedural barrier. As the State did not argue at that time, no factual basis exists now upon which to claim the district court abused its discretion merely because the resulting finding was in favor of Appellant. *See* 4 AA 803-04. For this reason, the district court's FFCOL states specifically that the petition is not procedurally barred, that good cause for late filing was found, and that claims three and four were not previously waived and were properly being heard on their merits. 4 AA 769-70. And Respondent acknowledges that the factual findings of the district court are to be given deference absent support in the record. *See RAB* at 17; *Little v. Warden*, 117

Nev. 845, 854 (2001). Thus, while a failure to identify good cause is an abuse of discretion, here, the District Court complied with NRS 34.726 (1) and found good cause. *See State v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005).

Notwithstanding the above, this matter is distinguishable from *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). In *Sullivan*, the parties stipulated to a two-month continuance, based upon a belief that the one-year timeline should reset upon the filing of an Amended Conviction. *Id.* Because Amended convictions "may be amended *at any time*…" it would be unreasonable to toll such time indefinitely. *Id.* Thus, the Court held that this was insufficient without demonstration to the district court's satisfaction both that the "delay is not the fault of the petitioner; and (b) That dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.* Here, *arguendo*, good cause would be met simply by virtue of the parties acting in accordance with their belief that the stipulation was legally binding. While it was certainly not so binding, but for this belief, the Petition would have been filed timely, and clearly no or limited prejudice resulted to Respondent given their position on the stipulation. 4 AA 803-04. This allows this Petition to fit squarely within the spirit of the procedural rules of allowing only one filing, without denying Appellant an opportunity to have his reasonable Constitutional claims heard on their merits. *See Pellegrini* 117 Nev. at 875.

The same is true as to the state's arguments regarding of waiver of claims two through five. The district court similarly found that,

> "In addition, the Court finds that contrary to the State's pleadings, Petitioner's claims three (3) and four (4) were not waived pursuant to NRS 34.810. Therefore, the Court finds that the instant Petition is not procedurally barred, and Petitioner's claims must be considered on their merits." 3 AA 770.

As the state also acknowledges not arguing waiver of claims two and five in district court, absent a clear abuse of discretion, the district court's decision must not be disturbed. *RAB* at 22. Therefore, the claims were properly heard on their merits, and the district court did not abuse its discretion in finding good cause in doing so.

b. Appellant did not receive effective assistance of counsel.

i. Failure to timely investigate or litigate Appellant's PTSD claim was unreasonable and prejudiced Appellant.

Substantial evidence existed in this case for over three years that should have prompted a PTSD evaluation that trial counsel sought for Appellant's defense. Respondent's argument that the evidence available did not prompt a duty to investigate is not in harmony with its concession that two competency reports are connected to PTSD insofar as they suggest it of Darion's mother, but not of Darion, and one report indicates that Darion self-reported suffering from PTSD. *RAB* at 30-31. At evidentiary hearing, trial counsel testified that he would have viewed the

reports prior to filing the Motion (December 19, 2016), imputing such knowledge at most only days before December 19, 2016. *RAB* at 33. However, trial counsel was attorney of record when competency proceedings terminated, meaning that on or around March 27, 2015, when Darion was deemed competent, counsel would have had to read or had access to the same reports. RA 293. Trial counsel also initially submitted argument on the Motion itself without discussing the competency evaluations before later stating "as far as I could tell going through the file, the issue of PTSD has not come up." 2 RA 307. There was then limited argument, when the district court provided copies of the same reports to trial counsel at the hearing on the Motion to Continue (December 28, 2016) 2 RA 304; 308. This suggests that the reports were either not in the file or not reviewed, and neither instance must be held against Darion and to his detriment. Prejudice exists in one of two ways. It exists by way of a failure to review any of the competency evaluations during the almost two years before filing the Motion to Continue, which would explain the comment that PTSD was referenced nowhere in the file; or secondly, prejudice exists because the same evaluations were not gathered during the 21 months subsequent to Appellant's return from competency and prior to the filing of the Motion.

There is also ample evidence to suggest that trial counsel had knowledge of the aforementioned evaluations, and belief in the worthiness of the defense, prompting a duty to investigate well in advance of the untimely filed and denied Motion. Here, there is inconsistency between what the Respondent argues about the benefits of

PTSD in Darion's defense (essentially none), as compared to his trial counsel, who testified at evidentiary hearing that "the Supreme Court sort of indicated that PTSD might be a determining factor in a self-defense case" and that he sought to have Darion evaluated for this reason. 4 AA 814-15. Thus, any reference to PTSD in the file (even if it was in passing) must have prompted further investigation, or at least a PTSD evaluation, which was not timely sought. *See RAB* at 32;

Thus, whether or not the reference was in passing is immaterial, as it would have prompted at least a good-faithed search or discussion with the client about the same, to see if it was a viable defense. This is particularly true, given the evaluation (and trial counsel's acknowledgement) that any stated any findings of malingering were not inconsistent with valid mental illness. 4 AA 820. Contrarily, Respondent's claim that "it was reasonable for trial counsel not to investigate this comment any further" is in stark contrast with trial counsel's testimony about the usefulness of such a defense if he could raise it. *RAB* at 32-33. Given trial counsel's claim and knowledge of how to utilize such a defense, and given that self-defense was alleged at trial, it is inconceivable that trial counsel did not or otherwise could not have obtained this information prior to December 28, 2016. 4 AA 814; 820. Altogether, this shows that any claim of PTSD counsel heard during this case would be integral to the self-defense claim he was preparing and investigating.

Moreover, the connection between such an investigation and likely success at trial was immediately apparent. This was a close case, given the several not guilty

verdicts, the fact that neither detective could tell who shot first, and the fact that surveillance demonstrated Darion pulling his firearm first. 2 AA 311; 3 AA 507; 2 RA 314-15. This greatly magnified the potential need for a PTSD defense to explain Appellant's hypervigilance.

Not only this, but there is a clear connection between the issue raised by trial counsel at the November 28, 2016, hearing, and the Motion filed nearly one month later, to suggest that the basis for both derived from Darion's PTSD claims. This would posit knowledge on a precise date, well within the deadlines to notice experts or timely obtain an evaluation. NRS 174.234 (2). At evidentiary hearing, trial counsel could not recall any issues but for the PTSD, and no Motions were filed but for the Motion to Continue by trial counsel, as pretrial Motions were all filed by the Special Public Defender. 1 RA 209; 227; 231; 234; 1 RA 248. When combined with Darion's testimony that he informed trial counsel about his belief that he suffered from PTSD immediately after a court hearing on or around March 9, 2016, this meets the preponderance of the evidence standard to demonstrate knowledge as of November 2016, even if this Court does not impute such knowledge during the preceding twenty-one months. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). There were no other witnesses called for the defense, no pretrial Motions filed by trial counsel, and no defense alleged but for the defense of self-defense. While it would require an assumption to connect the issue intimated in the November 2016 hearing

with Darion's claims to be suffering from PTSD, failing to assume the same requires suspension of disbelief.

Therefore, there was or should have been sufficient knowledge to litigate the PTSD defense well in advance of the December 2016 Motion, only nine days before calendar call, and doing so would have posed a reasonable likelihood of a different outcome at trial.

ii. Trial counsel failed to illicit the numerous times detective Miller suggested Borero shot first.

More than one statements by Detective Miller that suggested Darion did not shoot first would have undermined her credibility. While Respondent claims trial counsel did impeach Detective Miller, he asked her if she stated that "it appeared that Dale Borero fired the first shot." 3 AA 544-45. Although a slight distinction, Detective Miller did not explicitly say that Borero fired the first shot, but rather she wrote a chronological rendition of her review of the surveillance, and wanted the jury to believe that the only part of her report that was not in chronological order was the order of shooting, with the effect of that one change being that Appellant shot first. 3 AA 507. That she did so on more than one occasion only exacerbates her credibility issues, as the case ultimately appeared to hinge on her answer to the juror question concerning the sequence of the shooting. Each time Detective Miller wrote the chronology such that Borero shot first adds credence to the claim that the chronology was written intentionally in such a way, which Miller clearly denied. 3

AA 544-45. When Detective Miller denied this clear truth, it was no longer pursued, and not mentioned in closing. Because this was so crucial to the jury's verdict in this case, this amounted to IAC.

b. Detective Miller was not properly noticed as an expert.

Here, Detective Miller's testimony amounted to an expert opinion, in spite of *Duran v. Mueller*, 79 Nev. 453, 457, 386 P.2d 733, 735-36 (1963). *Duran* allows for an investigator who "testified as to skid marks, point of impact, apparent car direction, and car damage, to also testify as to how two automobiles collided." *Id.* at 735-36; *RAB* at 42. Here, Detective Miller relied on one fact (the nature in which Borero's gun ejected shell casings), and nothing else to reconstruct the shooting, and ignored that Borero's gun was capable of firing an additional shot for which a shell casing was not recovered. 3 AA 507; 2 AA 311; 393-94. And no trial testimony indicated that the scene was preserved from the time of the shooting, until the detective's arrival about one hour later. 2 AA 319. The fact that the scene could have easily been disturbed, and that the Respondent did not establish that it wasn't, indicates that there was insufficient basis upon which to form such a conclusion, which occurred precisely because a lay witness was allowed to make an expert conclusion. Not only that, but Detective Miller couched her conclusion as "We can't be entirely sure" despite the fact that her partner Mogg reviewed the same footage and could not come to any conclusion about who shot first. 2 AA 311; 3 AA 507. Altogether, this shows that it was improper to allow Detective Miller to opine on

who shot first, based solely upon the lack of a casing where one would have been found if the scene was preserved.

c. Reliance on misstated evidence deprived Appellant of a fair sentencing hearing.

Here, the physical evidence contradicts the sentencing court's finding that Appellant produced a gun and shot Borero before Borero produced a handgun. 3 AA 686. The testimony of Detective's Miller and Mogg, as well as the juror question, show that there is a meaningful dispute as to who shot first. 2 AA 348; 3 AA 544; 4 AA 780; 784. The sentencing court's claim cannot be reconciled with the timeline established at trial. If Appellant shot Borero before Borero posed a gun, there would have been no controversy as to who shot first. As such, the district court erred when it denied this claim and its finding must be reversed.

d. The state impermissibly commented on Appellant's Constitutional right to remain silent.

The state's comments to and about Appellant during cross-examination and rebuttal closing went to the heart of his right to remain silent, and must not be minimized as merely pointing out inconsistencies between a voluntary statement and trial testimony. Due process is always violated whenever a state prosecutor impeaches a defendant's exculpatory story with his failure to have previously told that story (subsequent *Miranda* warnings) when that story is told for the first time at trial. *Doyle* 462 U.S. 610, 96 S. Ct. 2240 (1976). The Respondent hinges its argument

on the notion that the State commented only on the inconsistency between Darion's statement at arrest, and his trial testimony; however, this is precisely what was deemed impermissible in *Doyle*, in which the following exchange took place:

> "Q. You said nothing at all about how you had been set up?
>
> "Q. Did Mr. Wood?
>
> "A. Not that I recall, Sir.
>
> "Q. As a matter of fact, if I recall your testimony correctly, you said instead of protesting your innocence, as you do today, you said in response to a question of Mr. Beamer, 'I don't know what you are talking about.'
>
> "A. I believe what I said, 'What's this all about?' If I remember, that's the only thing I said." *Doyle* 462 U.S. 610, 96 S. Ct. 2240 (1976) (footnote 5).

This is strikingly similar to Darion's statement to Detective Miller disavowing knowledge of the matter. *RAB* at 48.

Similarly, the state acknowledges its comments in closing, such as,

> "The four-year plan, what's that? Well the Defendant has four years to figure out what he was going to say on the stand." 3 AA 587.

Not only this, but the state commented to the jury that Darion had to testify to defend against the allegation that he robbed Borero or that he had to testify to negate the video. 3 AA 608-09. The comments here are indistinguishable from *Doyle*,

where the state noted during cross-examination that Doyle stated to authorities before going silent that "I don't know what you're talking about" and said nothing about "how you had been set up." *Doyle* 96 S. Ct. at 2243 This is precisely what the Respondent alludes to as improper in their Answering Brief, and distinguishes from *McCraney*, claiming the state here did not comment on the Appellant's exercise of silence, but rather commented only on the inconsistency between his statement and trial testimony. *RAB* at 48-9. While it is true that Darion did not claim self-defense in his voluntary statement, his not doing so is not tantamount to an inconsistency with his trial testimony where he did.

Just like the case to which Respondent cites, *Harkness v. State*, 107 Nev. 800, 803 820 P.2d 759, 761 (1991), "there was a likelihood that the jury took those statements to be a comment on the defendant's failure to testify." *RAB* at 46. What else could the jury do but interpret "four-year plan" and 'four years to figure out what he was going to say on the stand" as a comment impugning the fact that Appellant had not come forward sooner with his self-defense claim. 3 AA 587. It is also indisputable that the state sought to paint Appellant in a negative light in saying so. Additionally, similar to *McCraney*, the lack of an objection ought not be fatal here, given the central right upon which the state infringed. 110 Nev. 250, 871 P.2d 922. This is because "where prosecutorial misconduct is prejudicial, the court may intervene *sua sponte* to protect the defendant's right to a fair trial. *McCraney v. State*, 110 Nev. 250, 256, 871 P.2d 922, 926 (1994). Although the court did so here during

Appellant's cross-examination, the failure to do so during closing was plain error. 3 AA 514. Finally, this shows that these comments were not made in passing, nor was there overwhelming evidence of guilt (as demonstrated herein) to render this harmless error. *See Morris*, 112 Nev. at 263.

Furthermore, contrary to the State's claims, Appellant did invoke his rights (or Detective Miller invoked his rights for him), but only after he spoke with Detective Miller initially. 3 AA 503. At that moment, and up until Appellant took the stand, he was invoked as to his right to silence and right to an attorney no differently than in *Doyle*; thus, the impugning that to the jury were impermissible. In this same way, telling the jury to hold against him that he had a four-year period during which he was able to formulate a plan is precisely that which *Doyle* deemed verboten. 3 AA 587.

e. The state conducted tailoring arguments prejudicing Appellant's Constitutional rights.

While the State is correct that *Woodstone* was not addressed in the original Petition, argument was first made not at the evidentiary hearing as the Respondent claims, but at the argument on the Petition requesting an evidentiary hearing. *RA* at 49; 4 AA 802. However, the Petition did seek to incorporate by reference any argument made at the time of oral argument. 1 AA 010.

Nonetheless, the state's comments were improper, as they were claims of general tailoring. While the State is correct that *Woodstone* declined to depart from

Portundo, the *Woodstone* Court also expressed significant reservation about such state conduct, and then emphasized, that such arguments were "particularly troubling" when raised for the first time during the state's rebuttal closing argument. *Woodstone v. State*, 435 P.3d 657 (Nev. 2019) (unpublished); *RAB* at 50. Respondent does not address this, demonstrating that the *Woodstone* Court's concerns were well-placed. The general tailoring argument is most evident in the state's comment at closing that Darion "had to deny" because "if it's a robbery it's a felony murder." 3 AA 608-09. There is no requirement for a defendant to deny any accusation against him by testifying to a jury, while there is a Constitutional prohibition against comments that suggest to the jury there should be some negative inference for them to draw from the defendant not testifying. *See Harkness*, 107 Nev. at 804. In this case, the inference was simply that Appellant had to testify, because if he didn't, he would be found guilty of felony murder or would be found guilty because of the video. 3 AA 608-09. Furthermore, while Respondent correctly points out that Appellant did not contemporaneously object, the district court's own *sua sponte* striking of the following question demonstrates at least the district court's awareness of comments impugning Appellant's right to silence or presence at trial:

"Q Okay. This is the first time you've said this statement?

A No. My lawyer -- no. The detectives –." 2 AA 477; *RAB* at 51.

This is precisely the "grossly unfair" outcome that *Woodstone* sought to avoid despite following *Portundo*. While the court *sua sponte* cut off the line of

questioning during Appellant's cross-examination, the broadside during rebuttal reiterated the same, but was at a time when Appellant could no longer respond. 2 AA 487; 3 AA 587; 3 AA 608-09. While the Court foreclosed such questioning during cross examination, the state's usage of the same type of comment during closing reintroduced the improper prejudice against Appellant. Also, key to distinguishing this matter from *Woodstone* is the comparison of its video surveillance to the instant matter. Where in *Woodstone*, "surveillance video that clearly showed the events preceding the battery" marginalized any need for the jury to rely on Appellant's credibility, here, there is indisputable evidence the video was not clear, placing Appellant' credibility at the forefront of the jury's mind. *Woodstone v. State*, 435 P.3d. Facts that show the video was not clear include, but are not limited to: Detective Miller's consent on cross examination that the video does not show who shot first; that after the State had completed its rebuttal witness, at least one juror still could not use the video to determine who shot first; Detective Mogg's admission that "I can't tell who fired the first shot" (despite that he was Detective Miller's partner in this matter); and Detective Miller's rebuttal statement about who shot first "technically, we have a fairly good idea, before immediately confirming "there's no way to be exactly sure." 2 AA 311; 3 AA 507; 544-45.

Therefore, to allow this questioning amounted to plain error, as the harm to Darion's credibility caused him prejudice and affected a fundamental right afforded

to defendants; namely the right to remain silent unless and until they choose to testify at trial.

f. Cumulative error in this case magnifies the harm Appellant suffered.

Respondent correctly notes that prejudice is a required element of any ineffective claim and argues that this means there can be no cumulative error on ineffective claims. *RAB* at 53. Respondent also cites non-binding authority to state that there should be no calculation of cumulative error for ineffective claims, given that the Nevada Supreme Court has not yet adopted such a standard. *RAB* at 53. However, although harm must be shown on a given ineffective claim to prevail, this does not detract from the possibility of multiple errors that exponentially increase prejudice, yet which do not pose sufficient prejudice when viewed independently. Logically, there can be no confidence in a trial infected with a multitude of errors that by themselves are nearly (but not quite) sufficient to reverse a conviction, solely because no one error is itself prejudicial. This is no different than the cumulative error review of claims on direct appeal. Therefore, to the extent there is error this Court finds, it must cumulate the same.

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CONCLUSION

Pursuant to the arguments above, Appellant, Darion Coleman, humbly requests that this Court REVERSE the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction), and/or grant any other relief this Court deems appropriate.

Dated this 23rd day of June 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. I hereby certify that the instant brief complies with the typeface and type style requirements of NRAP. 32 (a) (4) – (6), and that the font used is Times New Roman 14 Point in Microsoft Word.
2. That this brief complies with all applicable page and/or word limitations under NRAP 32(a)(7) and contains 4,808 words.
3. That I have read this appellate brief, and to the best of my knowledge and belief, it is not frivolous or interposed for any improper purposes, such as to harass or to cause unnecessary delay, or needless increase in the cost of litigation.
4. That this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular *NRAP* 28(e)(1), requiring that 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 found.

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I further 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 23rd day of June 2022

Respectfully submitted:

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that I filed the foregoing **APPELLANT'S REPLY BRIEF** with the Nevada Supreme Court by electronic filing. I certify that the following parties or their counsel of record are registered as e-filers and that they will be served electronically by the system, in accordance with the Master Service List:

Adam Laxalt, Esq.
Nevada Attorney General

Aaron Ford Esq.
Nevada Attorney General

Alexander Chen, Esq.
Chief Deputy District Attorney - Appellate

I further certify that on June 23rd, 2022, I served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** through personal mail, addressed in a sealed and prepaid envelope to:

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DATED this 23rd day of June 2022.

Waleed Zaman

Waleed Zaman, Esq.