IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL GARCIA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 83021

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. ROUTING STATEMENT

Appellant Raul Garcia ("Garcia") was convicted by a jury of multiple felonies: Sexual Assault on a Child Under the Age of Fourteen, a violation of NRS 200.336[1]; Lewdness With a Child Under the Age of Fourteen Years, a violation of NRS 201.230; and Lewdness With a Child Under the Age of Fourteen Years, a violation of NRS 201.336[2]. Appellant's Appendix ("AA")

[1] This appears to be a typographical error in the Judgment. NRS 200.336 does not exist. NRS 200.366 is the statutory citation for Sexual Assault and is the statute referenced in the Information filed on October 16, 2000. AA 1-3.

[2] This citation appears to be another typographical error in the district court's Judgment. NRS 201.336 does not exist. Instead, the correct citation is NRS 201.230, the same statutory citation for the other lewdness conviction, and as correctly set forth in the Information filed on October 16, 2000. AA 1-3.

pp. 10-11. All three of these convictions are Category A felonies. *See* NRS 200.366, 201.230(2).

Garcia appeals from the district court's Order Dismissing Motion to Correct an Illegal Sentence and Vacate Judgment and/or Modify Sentence ("Order") filed April 30, 2021. AA 120-130. In that Order, the district court construed Garcia's motion (hereinafter, "Petition") as a post-conviction petition for writ of habeas corpus. AA 121. Because Garcia was convicted of category A felonies, this case is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(3). However, this case also does not fall within the categories of cases that must be decided by the Nevada Supreme Court. NRAP 17(a). Therefore, this case may either be retained by the Nevada Supreme Court or assigned to the Court of Appeals. NRAP 17(b).

II. STATEMENT OF THE ISSUES

A. Did the district court err by finding that Garcia's untimely and successive Petition was procedurally barred?

B. Did the district court err by dismissing Garcia's untimely and successive Petition without conducting an evidentiary hearing?

III. ARGUMENT

A. The district court correctly concluded that Garcia had failed to demonstrate good cause to excuse his untimely Petition.

i. Standard of Review

"We give deference to the district court's factual findings regarding good cause, but we will review 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) *citing* Lott v. Mueller, 304 F.3d 918, 922 (9th Cir. 2002); Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

ii. Discussion

NRS 34.726(1) requires that "a petition must be filed within one year after entry of judgment of conviction or, if a timely appeal is taken from the judgment, within one year after this court issues its remittitur, absent a showing of good cause for the delay." Huebler, 128 Nev. at 197, 275 P.3d at 94 (citations omitted). Garcia appealed from his conviction and the Nevada Supreme Court entered its Order of Affirmance on March 14, 2002. AA 35-38. Remittitur issued on April 9, 2002. AA 40. Thus, Garcia's Petition was due by April 9, 2003.

Garcia did not file his first post-conviction petition for a writ of habeas corpus until July 11, 2012. AA 47-58. The instant Petition was not filed until December 30, 2019. AA 85-93. Additionally, because this was Garcia's second post-conviction petition for a writ of habeas corpus, the Petition was successive. NRS 34.810(2). And finally, because the Petition was filed more than five years after remittitur issued, the State specifically pled laches. NRS 34.800(2) and AA 107. Therefore, Garcia bears the burden of demonstrating good cause to overcome his untimely filing and the burden of overcoming the presumption of prejudice to the State.

"To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate two things: that the delay is not the fault of the petitioner and that the petitioner will be unduly prejudiced if the petition is dismissed as untimely." Huebler, 128 Nev. at 197, 275 P.3d at 94-95 (cleaned up). To show that the delay is not their fault, "a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) *citing* Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

Garcia claims that he has good cause to excuse his tardy filing because he primarily speaks Spanish. The district court concluded that this did not amount to good cause in Garcia's case because he has had assistance in filing post-conviction proceedings in English as early as 2012 and because he repeatedly failed to provide good cause. AA 125.

The district court relied upon the Ninth Circuit's opinion in Mendoza v. Carey for the premise that "the existence of a translator who can read and write English and who assists a petitioner during appellate proceedings renders equitable tolling inapplicable for the petitioner." 449 F.3d 1065, 1070 (9th Cir. 2006) *citing* Cobas v. Burgess, 306 F.3d 441, 444 (6th Cir. 2002). In Cobas, the Sixth Circuit further held "that where a petitioner's

alleged lack of proficiency in English has not prevented the petitioner from accessing the courts, that lack of proficiency is insufficient to justify an equitable tolling of the statute of limitations." 306 F.3d at 444.

The record clearly shows that Garcia filed the following documents, in English, with the district court: an Affidavit in Support of Application to Proceed in Forma Pauperis on March 27, 2007; a handwritten Request for Enlargement of Time (First Request) on September 9, 2009; a Petition for Writ of Habeas Corpus filed on July 11, 2012; a "First Amendment Petition for Writ of Habeas Corpus" (quotations in original) filed on September 25, 2012; and the instant handwritten Petition on December 30, 2019. AA 41-44, 45-46, 47-58, 63-74, 85-93. Thus, the district court's findings that the Petitioner has had assistance to file legal proceedings in English since at least 2012 is well-supported and in fact, the record shows that he has so accessed the courts since 2007. Thus, just as in Cobas, the record belies Garcia's claims that his lack of English proficiency prevented him from filing his Petition in a timely manner.

Finally, Garcia argued before the district court that laches would not apply because he "is simply claiming in part that his counsel was ineffective" and was not challenging facts presented at trial. AA 114. However, NRS 34.800(2) does not provide that prejudice to the State only

exists in instances where a petitioner is challenging facts established at trial. The presumption of prejudice that must be overcome is the prejudice to the State "in its ability to conduct a retrial of the petitioner." NRS 34.800(1)(b), Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001) (holding that "it is conceivable that a petitioner could demonstrate good cause for failure to comply with the one-year time limit and actual prejudice, but laches would nevertheless bar the claim because of prejudice to the State and failure to demonstrate a fundamental miscarriage of justice" citing to NRS 34.800(1)(b)).

Garcia failed to meaningfully address laches before the district court and does not address it at all in his Opening Brief. As a result, in addition to failing to demonstrate good cause for the untimely filing, Garcia also failed to overcome the presumption of prejudice to the State in its ability to retry him and his Petition was also properly barred on that ground.

B. The district court properly found that Garcia's Petition was belied by the record and did not allege sufficient facts to warrant an evidentiary hearing.

i. Standard of Review

"A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. However, a district court's findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong."

Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) *citing* Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996) and Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). An evidentiary hearing on a habeas petition is only required "when a post-conviction petitioner asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief." Nika v. State, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008) *citing* Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

ii. Discussion

Despite finding that Garcia's Petition was procedurally barred and that he did not demonstrate good cause to overcome the procedural defect, the district court went on to analyze Garcia's claims of ineffective assistance of counsel. AA 126-129. The district court found that Garcia had failed to allege sufficient facts that, if true, would warrant relief. AA 129.

Garcia claims that the district court should have conducted an evidentiary hearing on the matter because he pled the allegations with sufficient specificity. Opening Brief, p. 12. The district court credited Garcia's claims as raised in his Petition. AA 128. Specifically, the district court took at face value Garcia's claim in his Petition that he digitally penetrated the 10-year-old victim and then pulled his penis from his pants to try to get her to touch it before leaving the room for ten minutes and

returning to pull down the victim's pants and expose her buttocks. AA 88-89. Assuming Garcia's version of events as set forth in his Petition as true, he failed to describe a continuous assault as existed in Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004).

In Crowley, the petitioner rubbed his victim's penis on the outside of the victim's clothing as "a prelude to touching the victim's penis inside his underwear and the fellatio" that followed. 120 Nev. at 34, 83 P.3d at 285. Here, Garcia digitally penetrated the victim and then sought to have the victim touch his penis. Moreover, Garcia did not allege that his act of digitally penetrating the victim's vagina was somehow a prelude to his attempt to have her touch his penis. Thus, the district court did not err in finding that Garcia had failed to allege sufficient facts that, if true, would warrant relief.

Moreover, the other lewdness act, wherein Garcia was charged and convicted for pulling down the victim's pants and/or underwear and/or touching the victim's vagina with his tongue occurred, by Garcia's own account in his Petition, occurred 10 minutes after the first round of sexual contact. AA 88-89. Thus, Garcia failed to allege that act was sufficiently close in time to the other acts to warrant consolidation and the district

court did not err in finding that Garcia failed to demonstrate sufficient facts surrounding that act to warrant relief.

IV. CONCLUSION

Garcia filed his untimely Petition more than 16 years after it was due. The district court correctly found that Garcia failed to demonstrate good cause to overcome the untimely filing. The Petition was also subject to the doctrine of laches and Garcia failed to meaningfully address his burden in overcoming the presumption of prejudice to the State. Finally, even though the district court was not required to address the merits of Garcia's claims of ineffective assistance of counsel, it nevertheless correctly concluded that Garcia had failed to allege sufficient facts to warrant an evidentiary hearing. Therefore, the district court's Order should be affirmed.

DATED: December 22, 2021.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Kevin Naughton
Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: December 22, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on December 22, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Lyn E. Beggs, Esq.

/s/ Tatyana Kazantseva
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