

# IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN MICHAEL FERGASON,  
Appellant(s),

vs.

THE STATE OF NEVADA,  
Respondent(s),

Electronically Filed  
Aug 30 2021 10:29 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No: A-21-827365-W

Docket No: 83331

## RECORD ON APPEAL

**ATTORNEY FOR APPELLANT**  
BRYAN FERGASON #96803,  
PROPER PERSON  
P.O. BOX 650  
INDIAN SPRINGS, NV 89070

**ATTORNEY FOR RESPONDENT**  
STEVEN B. WOLFSON,  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NV 89155-2212

**A-21-827365-W**

**Bryan Ferguson, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)**

**I N D E X**

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Case No. 06-C228752-3  
Dept. No. XX

FILED  
JAN - 5 2021

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK.

*[Signature]*  
CLERK OF COURT

BRYAN FERGASON

Petitioner,

v.

PETITION FOR WRIT  
OF HABEAS CORPUS

A-21-827365-W  
Dept. 32

The State of Nevada  
Calvin Johnson, Warden HDSP  
Respondent(s)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.
- (7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: HDSP - CLARK COUNTY, Indian Springs, Nevada

2. Name and location of court which entered the judgment of conviction under attack: 8th Judicial District Court, Clark County, Nevada

3. Date of judgment of conviction: November 4, 2018

Case number: 06-C228752-3

(a) Length of sentence: Aggregate sentence of 26 years to Life

CLERK OF THE COURT

NOV 30 2020

RECEIVED

1 (b) If sentence is death, state any date upon which execution is scheduled:....

2 6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

3 Yes ..... No X....

4 If "yes," list crime, case number and sentence being served at this time: Not Applicable.....

5 .....  
6 .....  
7 7. Nature of offense involved in conviction being challenged: Conspiracy to Possess Stolen Property and/or  
8 to Commit Burglary; 9 counts of Possession of Stolen Property, Value "2,500" or more, and 15 counts  
9 of Possession of Stolen Property, Value "2,500" or more.

8 8. What was your plea? (check one)

10 (a) Not guilty X....

11 (b) Guilty .....

12 (c) Guilty but mentally ill .....

13 (d) Nolo contendere .....

14 9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a  
15 plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was  
16 negotiated, give details: Not Applicable.....

17 .....  
18 10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

19 (a) Jury X....

20 (b) Judge without a jury .....

21 11. Did you testify at the trial? Yes ..... No X....

22 12. Did you appeal from the judgment of conviction? Yes X.... No .....

23 13. If you did appeal, answer the following:

24 (a) Name of court: Nevada Supreme Court

25 (b) Case number or citation: unavailable (to Petitioner)

26 (c) Result: Order of Affirmance

27 (d) Date of result: August 4, 2010

28 (Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: Not Applicable.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes X No .....

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: 8th Judicial District Court / Nev. Supreme Court

(2) Nature of proceeding: Petition for Writ of Habeas Corpus (Post Conviction) / Appeal

(3) Grounds raised: Ineffective Assistance of Counsel (trial and appellate)

Ferguson's pro per writ was denied Nov 9, 2011, reversed and remanded April 6, 2012 and counsel appointed in subsequent habeas and habeas appeal litigation

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes X No .....

(5) Result: Petition Denied / Appeal Denied

(6) Date of result: August 16, 2016 / August 16, 2017

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

Not available

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: U.S. Dist. Court / 8th Jud. Dist. Ct.

(2) Nature of proceeding: 2254 Habeas / Sentence Modification

(3) Grounds raised: All state grounds / AB 236

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No X

(5) Result: Pending / Denied

(6) Date of result: Pending / August 25, 2020

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

None at this time / Not available

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

Denial of motion Appeal Dismissed by Nevada Supreme Court Oct 14, 2020 NO. 81852 on lack of jurisdiction.

1 (d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any  
2 petition, application or motion?

3 (1) First petition, application or motion? Yes X... No .....

4 Citation or date of decision: SUPRA.....

5 (2) Second petition, application or motion? Yes X.. No .....

6 Citation or date of decision: SUPRA.....

7 (3) Third or subsequent petitions, applications or motions? Yes X.... No .....

8 Citation or date of decision: SUPRA.....

9 (e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you  
10 did not. (You must relate specific facts in response to this question. Your response may be included on paper which  
11 is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in  
12 length.) Not Applicable. See Question 15, page (3), supra.  
13 .....

14 17. Has any ground being raised in this petition been previously presented to this or any other court by way of  
15 petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

16 (a) Which of the grounds is the same: Whether Ferguson is entitled to relief as to  
17 his sentence(s) by the changes made to Nevada law by AB 236.

18 (b) The proceedings in which these grounds were raised: A motion filed in the 6th  
19 Judicial District Court for Re-Sentencing.

20 (c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this  
21 question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your  
22 response may not exceed five handwritten or typewritten pages in length.) Grounds properly raised  
23 in the 1st instance by post conviction and not re-sentencing.

24 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached,  
25 were not previously presented in any other court, state or federal, list briefly what grounds were not so presented,  
26 and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your  
27 response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not  
28 exceed five handwritten or typewritten pages in length.) .....

1 changes to Nevada Law (AB 236) not previously available.

2 19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing  
3 of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in  
4 response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the  
5 petition. Your response may not exceed five handwritten or typewritten pages in length.) Yes AB236 went

6 into effect July 1, 2020. Petition filed within 1 year (4+ months) of new laws.  
7 This Petition challenges or seeks relief as to sentencing only.

8 20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment  
under attack? Yes ☒ No .....

9 If yes, state what court and the case number: Federal Court 2254 Petition - Represented by  
10 the Federal Public Defender's office.

11 21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on  
12 direct appeal: Cynthia Dustin, Esq. at trial and on Direct Appeal (including  
13 sentencing)

14 22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under  
15 attack? Yes ..... No ☒

16 If yes, specify where and when it is to be served, if you know: Not Applicable.

17  
18 23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the  
19 facts supporting each ground. If necessary you may attach pages stating additional grounds and facts  
20 supporting same.

1 (a) Ground ONE: Petitioner Ferguson is entitled to relief under AB 236  
2 as to the sentence(s) he received under both NRS 207.010 (Section  
3 86 of AB 236) and NRS 205.275 (Section 58 of AB 236) which have  
4 been changed (effective July 1, 2020) in his favor.

5 Supporting FACTS (Tell your story briefly without citing cases or law.):

6 Ferguson received an aggregate sentence of 26 yrs to life pursuant to a  
7 Judgment of Conviction filed April 6, 2009. This consisted of Ferguson being adjudicated  
8 and being given large habitual treatment under NRS 207.010 for multiple convictions of  
9 possession of stolen property both "B" and "C" felonies under NRS 205.275.  
10 Ferguson's conviction for conspiracy is not the subject of this writ.

11 AB 236 has changed both NRS 207.010 (Section 86 of AB 236) and  
12 NRS 205.275 (Section 58 of AB 236) which when applied to the facts and  
13 circumstances of Ferguson's JOC would seem to mandate habeas relief as to  
14 his sentence as it appears:

15 (1) Ferguson would not be eligible for the large habitual based upon a combination  
16 of the increase of prior convictions from 3 to 7, and prior felony convictions  
17 are now not felonies; and/or

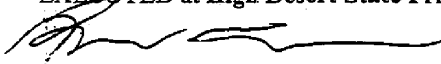
18 (2) The new habitual punishments under NRS 205.275, as revised by AB 236,  
19 even if made consecutive would result in a lesser sentence.

20 Ferguson is not trained in the law. He will need and believes he is  
21 entitled to representation of counsel at a re-sentencing (as well as issues  
22 related to it, such as these habeas proceedings) who can assist Ferguson  
23 in determining his rights and options as to the AB 236 changes.  
24  
25  
26  
27  
28



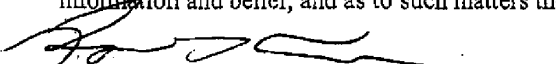
BEFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at High Desert State Prison on the 23 day of the month of Nov, 2020.

  
\* Bryan Ferguson #96803  
High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070  
Petitioner in Proper Person

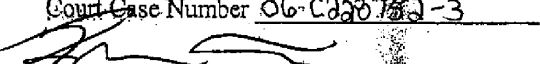
#### VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

  
\* Bryan Ferguson #96803  
High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070  
Petitioner in Proper Person

#### AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number 06-C228782-3 Does not contain the social security number of any person.

  
\* Bryan Ferguson #96803  
High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070  
Petitioner in Proper Person

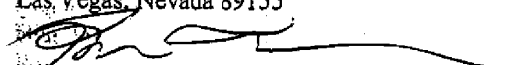
#### CERTIFICATE OF SERVICE BY MAIL

I, Bryan Ferguson, hereby certify pursuant to N.R.C.P. 5(b), that on this 23 day of the month of November, 2020, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Calvin Johnson  
Warden High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070

Attorney General of Nevada  
100 North Carson Street  
Carson City, Nevada 89701

Clark County District Attorney's Office  
200 Lewis Avenue  
Las Vegas, Nevada 89155

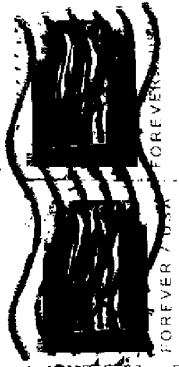
  
\* Bryan Ferguson #96803  
High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070  
Petitioner in Proper Person

\* Print your name and NDOC back number and sign

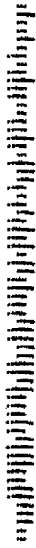
-17-

Wynn Ferguson #96803  
P.O. Box 650 H.D.S.F.  
Indian Springs NV, 89070

LAS VEGAS NV 890  
24 NOV 2020 PM 5 L



Clerk of the Court  
Steven D. Grierson  
200 Lewis Avenue 3<sup>rd</sup> floor  
Las Vegas, NV 89155-1160



000003-10158

HIGH DESERT STATE PRISON  
NOV 23 2021  
UNIT 7 A/B

1 PPOW

2  
3 **DISTRICT COURT**  
4 **CLARK COUNTY, NEVADA**

5 Bryan Fergason,

6 Petitioner,

7 vs.

8 State of Nevada; Calvin Johnson, Warden HDSP,

9 Respondent,

Case No: A-21-827365-W  
Department 32

**ORDER FOR PETITION FOR  
WRIT OF HABEAS CORPUS**

10  
11 Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on  
12 January 05, 2021. The Court has reviewed the Petition and has determined that a response would assist  
13 the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and  
14 good cause appearing therefore,

15 **IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this Order,  
16 answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS  
17 34.360 to 34.830, inclusive.

18 **IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's

19 Calendar on the 4th day of March, 202, at the hour of

20  
21 11:00  
22 \_\_\_\_\_ o'clock for further proceedings.

Dated this 6th day of January, 2021

23  
24 

25 District Court Judge  
26 C7A 076 96 1B 487C  
Christy Craig  
27 District Court Judge  
28

1 CSERV

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA  
4

5		
6	Bryan Fergason, Plaintiff(s)	CASE NO: A-21-827365-W
7	vs.	DEPT. NO. Department 32
8	State of Nevada, Defendant(s)	
9		

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 Electronic service was attempted through the Eighth Judicial District Court's  
12 electronic filing system, but there were no registered users on the case.

13  
14 If indicated below, a copy of the above mentioned filings were also served by mail  
15 via United States Postal Service, postage prepaid, to the parties listed below at their last  
known addresses on 1/7/2021

16	Bryan Fergason	#96803
17		HDSP
18		P.O. Box 650
19		Indian Springs, NV, 89070
20		
21		
22		
23		
24		
25		
26		
27		
28		

*Heather L. Hume*  
CLERK OF THE COURT

29  
3-28-21

Clerk of the court

RE: Hearing for petition of writ of Habeas Corpus / Notice of appeal

Bryan Ferguson petitioner  
vs.

Case # A-21-827365-W  
Dept 32

State of Nevada Calvin Johnson Warden H.D.S.P.  
Respondant

I had a court calendar date set to hear the matter of my petition for writ of habeas corpus on March 4<sup>th</sup> 2021, I have not received any paperwork or information as to what the ruling was. Was it denied? If so please use this as my official Notice of appeal for this matter. If it was rescheduled or if something else happened please let me know. Thank You

Notice of Appeal

Case # A-21-827365-W  
Dept 32

Appeal from denied ruling on March 4<sup>th</sup> 2021  
petition for writ of habeas corpus

3-28-21

*Bryan Ferguson*  
Bryan Ferguson #96803  
P.O. Box 650 H.D.S.P.  
Indian Springs NV 89070

CLERK OF THE COURT

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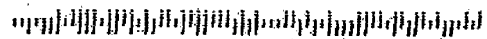
Bryan Ferguson #96803  
P.O. Box 650 H.D.S.P.  
Indian Springs NV 89070

LAS VEGAS NV 890  
29 MAR 2021 PM 4 L



Clerk of the Court  
Steven D. Grierson  
200 Lewis Avenue 3rd floor  
Las Vegas, NV 89155-1160

89101-630000





1 ASTA

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5  
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**  
7 **STATE OF NEVADA IN AND FOR**  
8 **THE COUNTY OF CLARK**

9 BRYAN FERGASON,

10 Plaintiff(s),

11 vs.

12  
13 STATE OF NEVADA; CALVIN JOHNSON,  
14 WARDEN HDSP,

15 Defendant(s),

Case No: A-21-827365-W

Dept No: XXXII

16  
17 **CASE APPEAL STATEMENT**

18 1. Appellant(s): Bryan Fergason

19 2. Judge: Christy Craig

20 3. Appellant(s): Bryan Fergason

21 Counsel:

22  
23 Bryan Fergason #96803  
24 P.O. Box 650  
Indian Springs, NV 89070

25 4. Respondent (s): State of Nevada; Calvin Johnson Warden HDSP

26 Counsel:

27 Steven B. Wolfson, District Attorney  
28 200 Lewis Ave.

Las Vegas, NV 89155-2212

5. Appellant(s)'s Attorney Licensed in Nevada: N/A  
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes  
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis\*\*: N/A  
*\*\*Expires 1 year from date filed*  
Appellant Filed Application to Proceed in Forma Pauperis: No  
Date Application(s) filed: N/A

9. Date Commenced in District Court: January 5, 2021

10. Brief Description of the Nature of the Action: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 8 day of April 2021.

Steven D. Grierson, Clerk of the Court

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk  
200 Lewis Ave  
PO Box 551601  
Las Vegas, Nevada 89155-1601  
(702) 671-0512

cc: Bryan Ferguson





1 **RSPN**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 JONATHAN VANBOSKERCK  
6 Chief Deputy District Attorney  
7 Nevada Bar #006528  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Respondent

7  
8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

9 BRYAN FERGASON, aka,  
10 Bryan Michael Fergason, #1299193

11 Petitioner,

CASE NO: A-21-827365-W

12 -vs-

06C228752-3

13 THE STATE OF NEVADA,

DEPT NO: XXXII

14 Respondent.

15 **STATE'S RESPONSE TO PETITIONER'S PETITION FOR**  
16 **WRIT OF HABEAS CORPUS (POST-CONVICTION)**

17 DATE OF HEARING: JULY 8, 2021

18 TIME OF HEARING: 11:00AM

18 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
19 District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney,  
20 and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for  
21 Writ of Habeas Corpus (Post-Conviction).

22 This response is made and based upon all the papers and pleadings on file herein, the  
23 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
24 deemed necessary by this Honorable Court.

25 //

26 //

27 //

28 //

\\CLARKCOUNTYDA.NET\CRM\CASE2\2006\650\61\200665061C-RSPN-(BRYAN MICHAEL FERGASON)-001.DOCX

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On December 13, 2006, the State charged Bryan Fergason (hereinafter "Petitioner") by  
4 way of Indictment the following: Count 1 – Conspiracy to Possess Stolen Property and/or to  
5 Commit Burglary (Gross Misdemeanor – NRS 205.275, 199.480); and Counts 2-27 –  
6 Possession of Stolen Property (Felony – NRS 205.275).<sup>1</sup> On February 1, 2007, Petitioner filed  
7 a pre-trial Petition for Writ of Habeas Corpus. The State filed its Return on February 14, 2007.  
8 The district court denied Petitioner's pre-trial Petition on November 8, 2007.

9 On April 25, 2008, Petitioner filed a Motion to Sever. The State filed its Opposition on  
10 April 28, 2008. On May 1, 2008, the district court granted Petitioner's Motion.

11 On May 7, 2008, Petitioner filed a Motion in Limine to Bar Admission of Evidence that  
12 Defendant Committed Burglary in the Instant Case. The State filed its Opposition on May 8,  
13 2008. On May 12, 2009, the district court granted in part and denied in part Petitioner's  
14 Motion. After further pre-trial litigation, Petitioner's jury trial commenced on May 21, 2008.  
15 The same day, the State filed a Third Amended Indictment with the same charges, naming  
16 only the Petitioner. On May 29, 2008, the jury returned a verdict finding Petitioner guilty of:  
17 Count 1 – Conspiracy to Possess Stolen Property and/or to Commit Burglary; Counts 2, 5-6,  
18 12, 18-21, 25, and 27 – Possession of Stolen Property, Value \$250.00 or more; Counts 4, 7-  
19 11, 13-17, 22-24, and 26 – Possession of Stolen Property, Value \$2,500.00 or more. The jury  
20 found Petitioner not guilty of Count 3.

21 On October 1, 2008, the district court adjudicated Petitioner guilty and sentenced him  
22 as follows: Count 1 – 12 months in the Clark County Detention Center (CCDC); Count 2 –  
23 twenty (20) years to life in the Nevada Department of Corrections (NDC); Counts 4-14 –  
24 twenty (20) years to life in the NDC, concurrent to Counts 1 and 2; Counts 15-27 – twenty  
25 (20) years to life in the NDC, concurrent with each other, but consecutive to Counts 1-2 and  
26 4-14, and Petitioner's convictions in Case No. C227874. Petitioner received zero (0) days  
27 credit for time served. The Judgment of Conviction was filed on November 4, 2008. On April  
28

---

<sup>1</sup> On December 15, 2006, the State filed an Amended Indictment, containing the same charges.

1 6, 2009, the district court filed an Amended Judgment of Conviction, wherein, the minimum  
2 term on Counts 4-14 and 15-27 was amended from twenty (20) years to ten (10) years.

3 Petitioner filed a Notice of Appeal on December 4, 2008. On August 4, 2010, the  
4 Nevada Supreme Court affirmed Petitioner's Judgment of Conviction. Remittitur issued on  
5 December 14, 2010.

6 On June 16, 2011, Petitioner filed a pro per Post-Conviction Petition for Writ of Habeas  
7 Corpus. The State filed its Response on August 9, 2011. On August 25, 2011, the district court  
8 denied Petitioner's Petition. The Findings of Fact, Conclusions of Law and Order was filed on  
9 November 9, 2011.

10 Petitioner filed a Notice of Appeal appealing the denial of the Petition on September  
11 22, 2011. On April 6, 2012, the Nevada Supreme Court ordered the denial of Petitioner's  
12 Petition reversed and remanded the case back for appointment of counsel, without reaching  
13 the merits of any other claims.

14 On May 15, 2012, Matthew Carling, Esq., was appointed as counsel. On November 2,  
15 2015, Petitioner filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus. The  
16 State filed its Response on January 15, 2016. Petitioner filed his Reply on February 19, 2016.  
17 On March 29, 2016, the district court ordered an evidentiary hearing on the matter. Following  
18 an evidentiary hearing on May 6, 2016, the district court denied Petitioner's Petition. The  
19 Findings of Fact, Conclusions of Law and Order was filed on August 16, 2016.

20 Petitioner filed a Notice of Appeal appealing the denial of the Petition on September 2,  
21 2016. On August 16, 2017, the Nevada Court of Appeals filed an Order Dismissing Appeal.  
22 Remittitur issued on September 20, 2017.

23 Petitioner filed a Motion to Amend Findings of Fact, Conclusions of Law and Order on  
24 September 15, 2017. The State filed its Response on September 19, 2017. On December 26,  
25 2017, the district court filed an Amended Findings of Fact, Conclusions of Law and Order.

26 On July 31, 2020, Petitioner filed a Motion to Withdraw Counsel, Re-Sentencing  
27 Pursuant to A.B. 236, and Appointment of Counsel. The State filed its Opposition on August  
28 18, 2020. On August 25, 2020, the district court denied Petitioner's Motions. The Order was

1 entered on September 2, 2020. Petitioner filed a Notice of Appeal on September 24, 2020,  
2 appealing the denial of his Motions. On October 14, 2020, the Nevada Supreme Court  
3 dismissed the appeal because the Court lacked jurisdiction to consider the appeal. Remittitur  
4 issued November 16, 2020.

5 On January 5, 2021, Petitioner filed the instant second Petition for Writ of Habeas  
6 Corpus (hereinafter "Second Petition"). The State's response now follows.

### 7 **ARGUMENT**

#### 8 **I. THIS SECOND PETITION IS TIME-BARRED**

9 Petitioner's instant Second Petition for Writ of Habeas Corpus was not filed within one  
10 year of the filing of the Judgment of Conviction. Thus, the Petition is time-barred. Pursuant to  
11 NRS 34.726(1):

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

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

22 The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain  
23 meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the  
24 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from  
25 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.  
26 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

27 The one-year time limit for preparing petitions for post-conviction relief under NRS  
28 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),  
the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite  
evidence presented by the defendant that he purchased postage through the prison and mailed  
the petition within the one-year time limit.

//

1 In the instant case, Petitioner filed a direct appeal, and Remittitur issued on December  
2 14, 2010. Petitioner filed the instant Petition on January 5, 2021—over eleven years after the  
3 Remittitur issued. Thus, the instant second Petition is time-barred. Absent a showing of good  
4 cause to excuse this delay, the instant Petition must be dismissed.

5 **II. THIS SECOND PETITION IS BARRED AS SUCCESSIVE**

6 NRS 34.810(2) reads:

7 A second or successive petition *must be dismissed* if the judge or  
8 justice determines that it fails to allege new or different grounds  
9 for relief and that the prior determination was on the merits or, if  
10 new and different grounds are alleged, the judge or justice finds  
11 that the failure of the petitioner to assert those grounds in a prior  
12 petition constituted an abuse of the writ.

13 (emphasis added).

14 Second or successive petitions are petitions that either fail to allege new or different  
15 grounds for relief and the grounds have already been decided on the merits or that allege new  
16 or different grounds, but a judge or justice finds that the petitioner's failure to assert those  
17 grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions  
18 will only be decided on the merits if the petitioner can show good cause and prejudice. NRS  
19 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v.  
20 State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that “where a defendant  
21 previously has sought relief from the judgment, the defendant's failure to identify all grounds  
22 for relief in the first instance should weigh against consideration of the successive motion.”)

23 The Nevada Supreme Court has stated: “Without such limitations on the availability of  
24 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-  
25 conviction remedies. In addition, meritless, successive and untimely petitions clog the court  
26 system and undermine the finality of convictions.” Lozada, 110 Nev. at 358, 871 P.2d at 950.  
27 The Nevada Supreme Court recognizes that “[u]nlike initial petitions which certainly require  
28 a careful review of the record, successive petitions may be dismissed based solely on the face  
of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words,  
if the claim or allegation was previously available with reasonable diligence, it is an abuse of

1 the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991).  
2 Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

3 Here, as discussed supra, Section I., this is Petitioner’s second Post-Conviction Petition.  
4 Petitioner did not raise this claim on direct appeal or in his first Petition. He only raises it for  
5 the first time now, eleven years later. Petitioner recently raised this exact issue in his Motion  
6 for Re-Sentencing Pursuant to A.B. 236, which was denied by the district court on August 25,  
7 2020. Accordingly, this second Petition is an abuse of the writ, procedurally barred, and  
8 therefore, must be dismissed.

### 9 III. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

10 The Nevada Supreme Court has held that the district court has a *duty* to consider  
11 whether a defendant’s post-conviction petition claims are procedurally barred. State v. Eighth  
12 Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court  
13 found that “[a]pplication of the statutory procedural default rules to post-conviction habeas  
14 petitions is mandatory,” noting:

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

18 Id. Additionally, the Court noted that procedural bars “cannot be ignored [by the district court]  
19 when properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court  
20 has granted no discretion to the district courts regarding whether to apply the statutory  
21 procedural bars; the rules *must* be applied.

22 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).  
23 There the Court ruled that the defendant’s petition was “untimely, successive, and an abuse of  
24 the writ” and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307  
25 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant’s  
26 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The  
27 procedural bars are so fundamental to the post-conviction process that they must be applied  
28

1 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.  
2 Therefore, application of the procedural bars is mandatory.

#### 3 IV. THE STATE AFFIRMATIVELY PLEADS LACHES

4 Certain limitations exist on how long a defendant may wait to assert a post-conviction  
5 request for relief. Consideration of the equitable doctrine of laches is necessary in determining  
6 whether a defendant has shown 'manifest injustice' that would permit a modification of a  
7 sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated:  
8 "Application of the doctrine to an individual case may require consideration of several factors,  
9 including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied  
10 waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3)  
11 whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev.  
12 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

13 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
14 exceeding five years [elapses] between the filing of a judgment of conviction, an order  
15 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of  
16 conviction and the filing of a petition challenging the validity of a judgment of conviction..."  
17 The Nevada Supreme Court has observed, "[P]etitions that are filed many years after  
18 conviction are an unreasonable burden on the criminal justice system. The necessity for a  
19 workable system dictates that there must exist a time when a criminal conviction is final."  
20 Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the  
21 statute requires the State plead laches. NRS 34.800(2).

22 The State affirmatively pleads laches in this case given that over eleven years has  
23 elapsed between the issuing of Remittitur and the filing of the second Petition. In order to  
24 overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving  
25 a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540,  
26 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus  
27 far, Petitioner has failed to meet that burden.

28 //

1 As discussed supra, Section I., the one-year time bar began to run from the date the of  
2 the Remittitur on December 14, 2010. The second Petition was filed on January 5, 2021 – *over*  
3 *eleven years* later. Because more than eleven years have elapsed between the Remittitur and  
4 the filing of the instant second Petition, NRS 34.800 directly applies in this case, and a  
5 presumption of prejudice to the State arises. Therefore, pursuant to NRS 34.800, this second  
6 Petition should be dismissed under the doctrine of laches.

7 **V. PETITIONER CANNOT ESTABLISH GOOD CAUSE TO OVERCOME**  
8 **THE MANDATORY PROCEDURAL BARS**

9 A showing of good cause and prejudice may overcome procedural bars. However,  
10 Petitioner cannot demonstrate good cause to explain why his Petition was untimely.

11 “To establish good cause, appellants must show that an impediment external to the  
12 defense prevented their compliance with the applicable procedural rule. A qualifying  
13 impediment might be shown where the factual or legal basis for a claim *was not reasonably*  
14 *available at the time of default.*” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)  
15 (emphasis added). The Court continued, “appellants cannot attempt to manufacture good  
16 cause[.]” Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a “substantial  
17 reason; one that affords a legal excuse.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503,  
18 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any  
19 delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

20 A petitioner raising good cause to excuse procedural bars must do so within a  
21 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34  
22 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see  
23 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably  
24 available to the petitioner during the statutory time period did not constitute good cause to  
25 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good  
26 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,  
27 453 120 S. Ct. 1587, 1592 (2000).

28 //



1 Further, to establish prejudice, the defendant must show “not merely that the errors of  
2 [the proceedings] created possibility of prejudice, but that they worked to his actual and  
3 substantial disadvantage, in affecting the state proceedings with error of constitutional  
4 dimensions.” Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United  
5 States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

6 In the instant case, Petitioner cannot demonstrate good cause to overcome the  
7 mandatory procedural bars because he cannot demonstrate that this claim was not reasonably  
8 available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525. Petitioner’s one and  
9 only claim is that he is entitled to relief under A.B. 236. Second Petition, at 6. A.B. 236 cannot  
10 provide good cause because it is inapplicable to Petitioner. Petitioner’s Amended Judgement  
11 of Conviction was filed on April 6, 2009—well before the effective date of A.B. 236.  
12 Therefore, Petitioner cannot establish good cause, and the Petition must be denied as time  
13 barred.

#### 14 VI. PETITIONER CANNOT ESTABLISH PREJUDICE

15 Petitioner’s only claim is that his sentence does not comport with the amendments made  
16 by A.B. 236. Second Petition, at 6. However, A.B. 236 was not in effect at the time of  
17 Petitioner’s conviction and sentence and is inapplicable to Petitioner’s case.

18 It is well established that, under Nevada law, the proper penalty for a criminal  
19 conviction is the penalty in effect at the time of the commission of the offense and not the  
20 penalty in effect at the time of sentencing. State v. Second Judicial Dist. Ct. (“Pullin”), 124  
21 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). Unless the Legislature clearly expresses its intent  
22 to apply a law retroactively, Nevada law requires the application of the law in effect at the  
23 time of the commission of the crime. Id.

24 Defendant’s sentence be modified based on the enactment of A.B. 236, which went into  
25 effect on July 1, 2019. The Legislature did not clearly express its intent to apply the law  
26 retroactively. Therefore, pursuant to Nevada law, the proper penalty for the Defendant’s  
27 conviction is that which was in effect at the time of the commission of the crime. In the instant  
28 case, the Court sentenced Defendant, for multiple convictions of Possession of Stolen

1 Property, under the Large Habitual Statute, to a maximum of life with a minimum parole  
2 eligibility of ten (10) years in the Nevada Department of Corrections. This sentence falls within  
3 the statutory sentencing guidelines because A.B. 236 is not applied retroactively. See NRS  
4 207.010. Therefore, Petitioner cannot establish prejudice to overcome the mandatory  
5 procedural bars.

6 **VII. PETITIONER'S CLAIM IS WAIVED FOR FAILING TO BE RAISED**  
7 **ON DIRECT APPEAL**

8 Petitioner's only claim is that he is entitled to relief under A.B. 236. Second Petition,  
9 at 6. Pursuant to NRS 34.810:

10 1. The court shall dismiss a petition if the court determines that:

11 (a) The petitioner's conviction was upon a plea of guilty or  
12 guilty but mentally ill and the petition is not based upon an  
13 allegation that the plea was involuntarily or unknowingly entered  
14 or that the plea was entered without effective assistance of counsel.

15 (b) The petitioner's conviction was the result of a trial and  
16 the grounds for the petition could have been:

17 (1) Presented to the trial court;

18 (2) Raised in a direct appeal or a prior petition for a  
19 writ of habeas corpus or postconviction relief; or

20 (3) Raised in any other proceeding that the  
21 petitioner has taken to secure relief from the petitioner's  
22 conviction and sentence, unless the court finds both cause  
23 for the failure to present the grounds and actual prejudice  
24 to the petitioner.

25 2. A second or successive petition must be dismissed if the judge  
26 or justice determines that it fails to allege new or different grounds  
27 for relief and that the prior determination was on the merits or, if  
28 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.

3. Pursuant to subsections 1 and 2, the petitioner has the burden  
of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the  
claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

The petitioner shall include in the petition all prior proceedings in  
which the petitioner challenged the same conviction or sentence.

4. The court may dismiss a petition that fails to include any prior  
proceedings of which the court has knowledge through the record  
of the court or through the pleadings submitted by the respondent.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and  
claims of ineffective assistance of trial and appellate counsel must first be pursued in post-  
conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be

1 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*"  
2 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)  
3 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A  
4 court must dismiss a habeas petition if it presents claims that either were or could have been  
5 presented in an earlier proceeding, unless the court finds both cause for failing to present the  
6 claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State,  
7 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

8 Furthermore, substantive claims are beyond the scope of habeas and waived. NRS  
9 34.724(2)(a); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752,  
10 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148,  
11 979 P.2d 222 (1999). Under NRS 34.810(3), a defendant may only escape these procedural  
12 bars if they meet the burden of establishing good cause and prejudice. Where a defendant does  
13 not show good cause for failure to raise claims of error upon direct appeal, the district court is  
14 not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536  
15 P.2d 1025 (1975).

16 Here, Petitioner cannot establish good cause or prejudice to escape the procedural  
17 defaults of this claim. Even so, the claim itself is not just time-barred, but is a substantive claim  
18 that goes beyond the scope of a habeas petition. Thus, this Petition must be denied.

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1 CONCLUSION


2 Based on the foregoing, Petitioner's Petition for Writ of Habeas Corpus (Post-  
3 Conviction) should be DENIED.

4 DATED this 4 day of May, 2021.

5 Respectfully submitted,

6 STEVEN B. WOLFSON  
7 Clark County District Attorney  
8 Nevada Bar #

9 BY

  
10 JONATHAN VANBOSKERCK  
11 Chief Deputy District Attorney  
12 Nevada Bar #006528

13 CERTIFICATE OF MAILING

14  
15 I hereby certify that service of the above and foregoing was made this 4th day of May,  
16 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

17 BRYAN FERGASON, NDC #96803  
18 HDSP  
19 P.O. BOX 650  
20 INDIAN SPRINGS, NV, 89070-0650

21  
22 BY

  
23 Secretary for the District Attorney's Office  
24  
25  
26  
27

28 06F21801C/bs/JVB/ckb/L4

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN MICHAEL FERGASON,  
Appellant,  
vs.  
THE STATE OF NEVADA; AND CALVIN  
JOHNSON, WARDEN HDSP,  
Respondents.

Supreme Court No. 82757  
District Court Case No. A827365; ~~0228762~~

**FILED**

MAY 27 2021

CLERK'S CERTIFICATE

*Elizabeth A. Brown*  
CLERK OF COURT

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDERS this appeal DISMISSED."

Judgment, as quoted above, entered this 30th day of April, 2021.

IN WITNESS WHEREOF, I have subscribed  
my name and affixed the seal of the Supreme  
Court at my Office in Carson City, Nevada this  
May 26, 2021.

Elizabeth A. Brown, Supreme Court Clerk

By: Rory Wunsch  
Deputy Clerk



IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN MICHAEL FERGASON,  
Appellant,  
vs.  
THE STATE OF NEVADA; AND  
CALVIN JOHNSON, WARDEN HDSP,  
Respondents.

No. 82757

**FILED**

APR 30 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER DISMISSING APPEAL*

This is a pro se appeal from a purported district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Christy L. Craig, Judge.

On April 7, 2021, appellant filed a notice of appeal from a purported district court order denying a postconviction petition for a writ of habeas corpus. However, the district court has not made a decision on appellant's petition at the time of the filing of the notice of appeal. Thus, the notice of appeal is premature. See NRS 177.015(3) (stating that a defendant only may appeal from a final judgment or verdict). Appellant may file an appeal from a final order of the district court denying the petition. Accordingly, this court

ORDERS this appeal DISMISSED.

Parraguirre, J.  
Parraguirre

Stiglich, J.  
Stiglich

Silver, J.  
Silver

SUPREME COURT  
OF  
NEVADA

(0) 1967A

21-12497

cc: Hon. Christy L. Craig, District Judge  
Bryan Michael Fergason  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

SUPREME COURT  
OF  
NEVADA

(S) 1947A 

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

BRYAN MICHAEL FERGASON,  
Appellant,  
vs.  
THE STATE OF NEVADA; AND CALVIN  
JOHNSON, WARDEN HDSP,  
Respondents.

**Supreme Court No. 82757**  
District Court Case No. A827365; ~~0220752~~

**REMITTITUR**

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: May 26, 2021

Elizabeth A. Brown, Clerk of Court

By: Rory Wunsch  
Deputy Clerk

cc (without enclosures):

Hon. Christy L. Craig, District Judge  
Bryan Michael Fergason  
Clark County District Attorney

**RECEIPT FOR REMITTITUR**

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on MAY 27 2021.

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED  
APPEALS  
MAY 27 2021  
CLERK OF THE COURT



*Heidi L. Smith*  
CLERK OF THE COURT

**FCL**  
**STEVEN B. WOLFSON**  
Clark County District Attorney  
Nevada Bar #001565  
**JONATHAN VANBOSKERCK**  
Chief Deputy District Attorney  
Nevada Bar #006528  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Respondent

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**BRYAN MICHAEL FERGASON,**  
#1299193

Petitioner,

-vs-

**THE STATE OF NEVADA,**

Respondent.

CASE NO: A-21-827365-W

06C228752-3

DEPT NO: XXXII

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

DATE OF HEARING: JULY 8, 2021  
TIME OF HEARING: 11:00AM

THIS CAUSE having come on for hearing before the Honorable CHRISTY CRAIG, District Judge, on the 8th day of July, 2021, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through CHAD N. LEXIS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **STATEMENT OF THE CASE**

3 On December 13, 2006, the State charged Bryan Fergason (hereinafter "Petitioner") by  
4 way of Indictment the following: Count 1 – Conspiracy to Possess Stolen Property and/or to  
5 Commit Burglary (Gross Misdemeanor – NRS 205.275, 199.480); and Counts 2-27 –  
6 Possession of Stolen Property (Felony – NRS 205.275).<sup>1</sup> On February 1, 2007, Petitioner filed  
7 a pre-trial Petition for Writ of Habeas Corpus. The State filed its Return on February 14, 2007.  
8 The district court denied Petitioner's pre-trial Petition on November 8, 2007.

9 On April 25, 2008, Petitioner filed a Motion to Sever. The State filed its Opposition on  
10 April 28, 2008. On May 1, 2008, the district court granted Petitioner's Motion.

11 On May 7, 2008, Petitioner filed a Motion in Limine to Bar Admission of Evidence that  
12 Defendant Committed Burglary in the Instant Case. The State filed its Opposition on May 8,  
13 2008. On May 12, 2009, the district court granted in part and denied in part Petitioner's  
14 Motion. After further pre-trial litigation, Petitioner's jury trial commenced on May 21, 2008.  
15 The same day, the State filed a Third Amended Indictment with the same charges, naming  
16 only the Petitioner. On May 29, 2008, the jury returned a verdict finding Petitioner guilty of:  
17 Count 1 – Conspiracy to Possess Stolen Property and/or to Commit Burglary; Counts 2, 5-6,  
18 12, 18-21, 25, and 27 – Possession of Stolen Property, Value \$250.00 or more; Counts 4, 7-  
19 11, 13-17, 22-24, and 26 – Possession of Stolen Property, Value \$2,500.00 or more. The jury  
20 found Petitioner not guilty of Count 3.

21 On October 1, 2008, the district court adjudicated Petitioner guilty and sentenced him  
22 as follows: Count 1 – 12 months in the Clark County Detention Center (CCDC); Count 2 –  
23 twenty (20) years to life in the Nevada Department of Corrections (NDC); Counts 4-14 –  
24 twenty (20) years to life in the NDC, concurrent to Counts 1 and 2; Counts 15-27 – twenty  
25 (20) years to life in the NDC, concurrent with each other, but consecutive to Counts 1-2 and  
26 4-14, and Petitioner's convictions in Case No. C227874. Petitioner received zero (0) days  
27 credit for time served. The Judgment of Conviction was filed on November 4, 2008. On April

28 <sup>1</sup> On December 15, 2006, the State filed an Amended Indictment, containing the same charges.

1 6, 2009, the district court filed an Amended Judgment of Conviction, wherein, the minimum  
2 term on Counts 4-14 and 15-27 was amended from twenty (20) years to ten (10) years.

3 Petitioner filed a Notice of Appeal on December 4, 2008. On August 4, 2010, the  
4 Nevada Supreme Court affirmed Petitioner's Judgment of Conviction. Remittitur issued on  
5 December 14, 2010.

6 On June 16, 2011, Petitioner filed a pro per Post-Conviction Petition for Writ of Habeas  
7 Corpus. The State filed its Response on August 9, 2011. On August 25, 2011, the district court  
8 denied Petitioner's Petition. The Findings of Fact, Conclusions of Law and Order was filed on  
9 November 9, 2011.

10 Petitioner filed a Notice of Appeal appealing the denial of the Petition on September  
11 22, 2011. On April 6, 2012, the Nevada Supreme Court ordered the denial of Petitioner's  
12 Petition reversed and remanded the case back for appointment of counsel, without reaching  
13 the merits of any other claims.

14 On May 15, 2012, Matthew Carling, Esq., was appointed as counsel. On November 2,  
15 2015, Petitioner filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus. The  
16 State filed its Response on January 15, 2016. Petitioner filed his Reply on February 19, 2016.  
17 On March 29, 2016, the district court ordered an evidentiary hearing on the matter. Following  
18 an evidentiary hearing on May 6, 2016, the district court denied Petitioner's Petition. The  
19 Findings of Fact, Conclusions of Law and Order was filed on August 16, 2016.

20 Petitioner filed a Notice of Appeal appealing the denial of the Petition on September 2,  
21 2016. On August 16, 2017, the Nevada Court of Appeals filed an Order Dismissing Appeal.  
22 Remittitur issued on September 20, 2017.

23 Petitioner filed a Motion to Amend Findings of Fact, Conclusions of Law and Order on  
24 September 15, 2017. The State filed its Response on September 19, 2017. On December 26,  
25 2017, the district court filed an Amended Findings of Fact, Conclusions of Law and Order.

26 On July 31, 2020, Petitioner filed a Motion to Withdraw Counsel, Re-Sentencing  
27 Pursuant to A.B. 236, and Appointment of Counsel. The State filed its Opposition on August  
28 18, 2020. On August 25, 2020, the district court denied Petitioner's Motions. The Order was

1 entered on September 2, 2020. Petitioner filed a Notice of Appeal on September 24, 2020,  
2 appealing the denial of his Motions. On October 14, 2020, the Nevada Supreme Court  
3 dismissed the appeal because the Court lacked jurisdiction to consider the appeal. Remittitur  
4 issued November 16, 2020.

5 On January 5, 2021, Petitioner filed the instant second Petition for Writ of Habeas  
6 Corpus (hereinafter "Second Petition"). The State filed its Response on May 4, 2021.  
7 Following a hearing on July 8, 2021, this Court now finds and concludes as follows:

### 8 **AUTHORITY**

#### 9 **I. THIS SECOND PETITION IS TIME-BARRED**

10 Petitioner's instant Second Petition for Writ of Habeas Corpus was not filed within one  
11 year of the filing of the Judgment of Conviction. Thus, the Petition is time-barred. Pursuant to  
12 NRS 34.726(1):

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

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

19 The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain  
20 meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the  
21 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from  
22 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.  
23 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

24 The one-year time limit for preparing petitions for post-conviction relief under NRS  
25 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),  
26 the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite  
27 evidence presented by the defendant that he purchased postage through the prison and mailed  
28 the petition within the one-year time limit.

1 In the instant case, Petitioner filed a direct appeal, and Remittitur issued on December  
2 14, 2010. Petitioner filed the instant Petition on January 5, 2021—over eleven years after the  
3 Remittitur issued. Thus, the instant second Petition is time-barred. Absent a showing of good  
4 cause to excuse this delay, the instant Petition is dismissed.

5 **II. THIS SECOND PETITION IS BARRED AS SUCCESSIVE**

6 NRS 34.810(2) reads:

7 A second or successive petition *must be dismissed* if the judge or  
8 justice determines that it fails to allege new or different grounds  
9 for relief and that the prior determination was on the merits or, if  
10 new and different grounds are alleged, the judge or justice finds  
11 that the failure of the petitioner to assert those grounds in a prior  
12 petition constituted an abuse of the writ.  
(emphasis added).

13 Second or successive petitions are petitions that either fail to allege new or different  
14 grounds for relief and the grounds have already been decided on the merits or that allege new  
15 or different grounds but a judge or justice finds that the petitioner's failure to assert those  
16 grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions  
17 will only be decided on the merits if the petitioner can show good cause and prejudice. NRS  
18 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v.  
19 State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that “where a defendant  
20 previously has sought relief from the judgment, the defendant’s failure to identify all grounds  
21 for relief in the first instance should weigh against consideration of the successive motion.”)

22 The Nevada Supreme Court has stated: “Without such limitations on the availability of  
23 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-  
24 conviction remedies. In addition, meritless, successive and untimely petitions clog the court  
25 system and undermine the finality of convictions.” Lozada, 110 Nev. at 358, 871 P.2d at 950.  
26 The Nevada Supreme Court recognizes that “[u]nlike initial petitions which certainly require  
27 a careful review of the record, successive petitions may be dismissed based solely on the face  
28 of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words,  
if the claim or allegation was previously available with reasonable diligence, it is an abuse of

1 the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991).  
2 Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

3 Here, as discussed supra, Section I., this is Petitioner’s second Post-Conviction Petition.  
4 Petitioner did not raise this claim on direct appeal or in his first Petition. He only raises it for  
5 the first time now, eleven years later. Petitioner recently raised this exact issue in his Motion  
6 for Re-Sentencing Pursuant to A.B. 236, which was denied by the district court on August 25,  
7 2020. Accordingly, this second Petition is an abuse of the writ, procedurally barred, and  
8 therefore, dismissed.

### 9 III. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

10 The Nevada Supreme Court has held that the district court has a *duty* to consider  
11 whether a defendant’s post-conviction petition claims are procedurally barred. State v. Eighth  
12 Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court  
13 found that “[a]pplication of the statutory procedural default rules to post-conviction habeas  
14 petitions is mandatory,” noting:

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

18 Id. Additionally, the Court noted that procedural bars “cannot be ignored [by the district court]  
19 when properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court  
20 has granted no discretion to the district courts regarding whether to apply the statutory  
21 procedural bars; the rules *must* be applied.

22 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).  
23 There the Court ruled that the defendant’s petition was “untimely, successive, and an abuse of  
24 the writ” and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307  
25 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant’s  
26 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The  
27 procedural bars are so fundamental to the post-conviction process that they must be applied  
28

1 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.  
2 Therefore, application of the procedural bars is mandatory.

#### 3 IV. THE STATE AFFIRMATIVELY PLEADS LACHES

4 Certain limitations exist on how long a defendant may wait to assert a post-conviction  
5 request for relief. Consideration of the equitable doctrine of laches is necessary in determining  
6 whether a defendant has shown 'manifest injustice' that would permit a modification of a  
7 sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated:  
8 "Application of the doctrine to an individual case may require consideration of several factors,  
9 including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied  
10 waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3)  
11 whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev.  
12 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

13 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
14 exceeding five years [elapses] between the filing of a judgment of conviction, an order  
15 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of  
16 conviction and the filing of a petition challenging the validity of a judgment of conviction..."  
17 The Nevada Supreme Court has observed, "[P]etitions that are filed many years after  
18 conviction are an unreasonable burden on the criminal justice system. The necessity for a  
19 workable system dictates that there must exist a time when a criminal conviction is final."  
20 Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the  
21 statute requires the State plead laches. NRS 34.800(2).

22 The State affirmatively pleads laches in this case given that over eleven years has  
23 elapsed between the issuing of Remittitur and the filing of the second Petition. In order to  
24 overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving  
25 a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540,  
26 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus  
27 far, Petitioner has failed to meet that burden.  
28

1 As discussed supra, Section I., the one-year time bar began to run from the date the of  
2 the Remittitur on December 14, 2010. The second Petition was filed on January 5, 2021 – *over*  
3 *eleven years* later. Because more than eleven years have elapsed between the Remittitur and  
4 the filing of the instant second Petition, NRS 34.800 directly applies in this case, and a  
5 presumption of prejudice to the State arises. Therefore, pursuant to NRS 34.800, this second  
6 Petition is dismissed under the doctrine of laches.

7 **V. PETITIONER CANNOT ESTABLISH GOOD CAUSE TO OVERCOME**  
8 **THE MANDATORY PROCEDURAL BARS**

9 A showing of good cause and prejudice may overcome procedural bars. However,  
10 Petitioner cannot demonstrate good cause to explain why his Petition was untimely.

11 “To establish good cause, appellants must show that an impediment external to the  
12 defense prevented their compliance with the applicable procedural rule. A qualifying  
13 impediment might be shown where the factual or legal basis for a claim *was not reasonably*  
14 *available at the time of default.*” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)  
15 (emphasis added). The Court continued, “appellants cannot attempt to manufacture good  
16 cause[.]” Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a “substantial  
17 reason; one that affords a legal excuse.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503,  
18 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any  
19 delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

20 A petitioner raising good cause to excuse procedural bars must do so within a  
21 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34  
22 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see  
23 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably  
24 available to the petitioner during the statutory time period did not constitute good cause to  
25 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good  
26 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,  
27 453 120 S. Ct. 1587, 1592 (2000).

28 //



1 Further, to establish prejudice, the defendant must show “not merely that the errors of  
2 [the proceedings] created possibility of prejudice, but that they worked to his actual and  
3 substantial disadvantage, in affecting the state proceedings with error of constitutional  
4 dimensions.” Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United  
5 States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

6 In the instant case, Petitioner cannot demonstrate good cause to overcome the  
7 mandatory procedural bars because he cannot demonstrate that this claim was not reasonably  
8 available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525. Petitioner’s one and  
9 only claim is that he is entitled to relief under A.B. 236. Second Petition, at 6. A.B. 236 cannot  
10 provide good cause because it is inapplicable to Petitioner. Petitioner’s Amended Judgement  
11 of Conviction was filed on April 6, 2009—well before the effective date of A.B. 236.  
12 Therefore, Petitioner cannot establish good cause, and the Petition is denied as time barred.

#### 13 VI. PETITIONER CANNOT ESTABLISH PREJUDICE

14 Petitioner’s only claim is that his sentence does not comport with the amendments made  
15 by A.B. 236. Second Petition, at 6. However, A.B. 236 was not in effect at the time of  
16 Petitioner’s conviction and sentence and is inapplicable to Petitioner’s case.

17 It is well established that, under Nevada law, the proper penalty for a criminal  
18 conviction is the penalty in effect at the time of the commission of the offense and not the  
19 penalty in effect at the time of sentencing. State v. Second Judicial Dist. Ct. (“Pullin”), 124  
20 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). Unless the Legislature clearly expresses its intent  
21 to apply a law retroactively, Nevada law requires the application of the law in effect at the  
22 time of the commission of the crime. Id.

23 Petitioner’s sentence cannot be modified based on the enactment of A.B. 236, which went  
24 into effect on July 1, 2019. The Legislature did not clearly express its intent to apply the law  
25 retroactively. Therefore, pursuant to Nevada law, the proper penalty for the Petitioner’s  
26 conviction is that which was in effect at the time of the commission of the crime. In the instant  
27 case, the Court sentenced Petitioner, for multiple convictions of Possession of Stolen Property,  
28 under the Large Habitual Statute, to a maximum of life with a minimum parole eligibility of

1 ten (10) years in the Nevada Department of Corrections. This sentence falls within the statutory  
2 sentencing guidelines because A.B. 236 is not applied retroactively. See NRS 207.010.  
3 Therefore, Petitioner cannot establish prejudice to overcome the mandatory procedural bars.

4 **VII. PETITIONER'S CLAIM IS WAIVED FOR FAILING TO BE RAISED**  
5 **ON DIRECT APPEAL**

6 Petitioner's only claim is that he is entitled to relief under A.B. 236. Second Petition,  
7 at 6. Pursuant to NRS 34.810:

8 1. The court shall dismiss a petition if the court determines that:

9 (a) The petitioner's conviction was upon a plea of guilty or  
10 guilty but mentally ill and the petition is not based upon an  
11 allegation that the plea was involuntarily or unknowingly entered  
12 or that the plea was entered without effective assistance of counsel.

13 (b) The petitioner's conviction was the result of a trial and  
14 the grounds for the petition could have been:

15 (1) Presented to the trial court;

16 (2) Raised in a direct appeal or a prior petition for a  
17 writ of habeas corpus or postconviction relief; or

18 (3) Raised in any other proceeding that the  
19 petitioner has taken to secure relief from the petitioner's  
20 conviction and sentence unless the court finds both cause  
21 for the failure to present the grounds and actual prejudice  
22 to the petitioner.

23 2. A second or successive petition must be dismissed if the judge  
24 or justice determines that it fails to allege new or different grounds  
25 for relief and that the prior determination was on the merits or, if  
26 new and different grounds are alleged, the judge or justice finds  
27 that the failure of the petitioner to assert those grounds in a prior  
28 petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden  
of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the  
claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

The petitioner shall include in the petition all prior proceedings in  
which the petitioner challenged the same conviction or sentence.

4. The court may dismiss a petition that fails to include any prior  
proceedings of which the court has knowledge through the record  
of the court or through the pleadings submitted by the respondent.

24 The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and  
25 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-  
26 conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be  
27 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*"  
28 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)

1 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A  
2 court must dismiss a habeas petition if it presents claims that either were or could have been  
3 presented in an earlier proceeding, unless the court finds both cause for failing to present the  
4 claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State,  
5 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

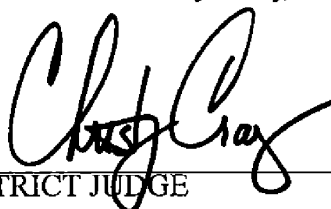
6 Furthermore, substantive claims are beyond the scope of habeas and waived. NRS  
7 34.724(2)(a); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752,  
8 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148,  
9 979 P.2d 222 (1999). Under NRS 34.810(3), a defendant may only escape these procedural  
10 bars if they meet the burden of establishing good cause and prejudice. Where a defendant does  
11 not show good cause for failure to raise claims of error upon direct appeal, the district court is  
12 not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536  
13 P.2d 1025 (1975).

14 Here, Petitioner cannot establish good cause or prejudice to escape the procedural  
15 defaults of this claim. Even so, the claim itself is not just time-barred, but is a substantive claim  
16 that goes beyond the scope of a habeas petition. Thus, this Petition is denied.

17 **ORDER**

18 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief  
19 shall be, and it is, hereby denied.

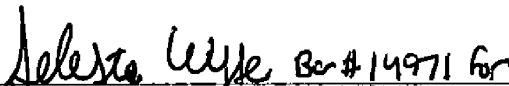
Dated this 28th day of July, 2021

20   
21  
22 DISTRICT JUDGE

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

25 2B9 B27 8BAB 14F6  
26 Christy Craig  
27 District Court Judge

28 BY

  
26 JONATHAN VANBOSKERCK  
27 Chief Deputy District Attorney  
Nevada Bar #006528

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CERTIFICATE OF SERVICE

I certify that on the 27<sup>th</sup> day of July, 2021, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

BRYAN FERGASON, NDC #96803  
HDSP  
P.O. BOX 650  
INDIAN SPRINGS, NV 89070

BY   
Secretary for the District Attorney's Office

06F21801C/bs/JV/ckb/L4

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Bryan Fergason, Plaintiff(s)

CASE NO: A-21-827365-W

7 vs.

DEPT. NO. Department 32

8 State of Nevada, Defendant(s)

9  
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District  
12 Court. The foregoing Finding of Fact and Conclusions of Law was served via the court's  
13 electronic eFile system to all recipients registered for e-Service on the above entitled case as  
14 listed below:

15 Service Date: 7/28/2021

16 Department XXXII

Dept32LC@clarkcountycourts.us



1 NEFF

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA  
4

5 BRYAN FERGASON,

6 Petitioner,

Case No: A-21-827365-W

Dept No: XXXII

7 vs.

8 STATE OF NEVADA; ET.AL.,

9 Respondent,

NOTICE OF ENTRY OF FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

11 PLEASE TAKE NOTICE that on July 28, 2021, the court entered a decision or order in this matter, a true  
12 and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you  
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed  
to you. This notice was mailed on July 28, 2021.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

18  
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 28 day of July 2021, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

22 Clark County District Attorney's Office  
Attorney General's Office – Appellate Division-

23  
24 ☒ The United States mail addressed as follows:

25 Bryan Fergason # 96803  
P.O. Box 650  
Indian Springs, NV 89070

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

*Heidi L. Smith*  
CLERK OF THE COURT

**FCL**  
**STEVEN B. WOLFSON**  
Clark County District Attorney  
Nevada Bar #001565  
**JONATHAN VANBOSKERCK**  
Chief Deputy District Attorney  
Nevada Bar #006528  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Respondent

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**BRYAN MICHAEL FERGASON,**  
#1299193

Petitioner,

-vs-

**THE STATE OF NEVADA,**

Respondent.

CASE NO: A-21-827365-W

06C228752-3

DEPT NO: XXXII

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

DATE OF HEARING: JULY 8, 2021  
TIME OF HEARING: 11:00AM

THIS CAUSE having come on for hearing before the Honorable CHRISTY CRAIG, District Judge, on the 8th day of July, 2021, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through CHAD N. LEXIS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **STATEMENT OF THE CASE**

3 On December 13, 2006, the State charged Bryan Fergason (hereinafter "Petitioner") by  
4 way of Indictment the following: Count 1 – Conspiracy to Possess Stolen Property and/or to  
5 Commit Burglary (Gross Misdemeanor – NRS 205.275, 199.480); and Counts 2-27 –  
6 Possession of Stolen Property (Felony – NRS 205.275).<sup>1</sup> On February 1, 2007, Petitioner filed  
7 a pre-trial Petition for Writ of Habeas Corpus. The State filed its Return on February 14, 2007.  
8 The district court denied Petitioner's pre-trial Petition on November 8, 2007.

9 On April 25, 2008, Petitioner filed a Motion to Sever. The State filed its Opposition on  
10 April 28, 2008. On May 1, 2008, the district court granted Petitioner's Motion.

11 On May 7, 2008, Petitioner filed a Motion in Limine to Bar Admission of Evidence that  
12 Defendant Committed Burglary in the Instant Case. The State filed its Opposition on May 8,  
13 2008. On May 12, 2009, the district court granted in part and denied in part Petitioner's  
14 Motion. After further pre-trial litigation, Petitioner's jury trial commenced on May 21, 2008.  
15 The same day, the State filed a Third Amended Indictment with the same charges, naming  
16 only the Petitioner. On May 29, 2008, the jury returned a verdict finding Petitioner guilty of:  
17 Count 1 – Conspiracy to Possess Stolen Property and/or to Commit Burglary; Counts 2, 5-6,  
18 12, 18-21, 25, and 27 – Possession of Stolen Property, Value \$250.00 or more; Counts 4, 7-  
19 11, 13-17, 22-24, and 26 – Possession of Stolen Property, Value \$2,500.00 or more. The jury  
20 found Petitioner not guilty of Count 3.

21 On October 1, 2008, the district court adjudicated Petitioner guilty and sentenced him  
22 as follows: Count 1 – 12 months in the Clark County Detention Center (CCDC); Count 2 –  
23 twenty (20) years to life in the Nevada Department of Corrections (NDC); Counts 4-14 –  
24 twenty (20) years to life in the NDC, concurrent to Counts 1 and 2; Counts 15-27 – twenty  
25 (20) years to life in the NDC, concurrent with each other, but consecutive to Counts 1-2 and  
26 4-14, and Petitioner's convictions in Case No. C227874. Petitioner received zero (0) days  
27 credit for time served. The Judgment of Conviction was filed on November 4, 2008. On April

28 <sup>1</sup> On December 15, 2006, the State filed an Amended Indictment, containing the same charges.



1 6, 2009, the district court filed an Amended Judgment of Conviction, wherein, the minimum  
2 term on Counts 4-14 and 15-27 was amended from twenty (20) years to ten (10) years.

3 Petitioner filed a Notice of Appeal on December 4, 2008. On August 4, 2010, the  
4 Nevada Supreme Court affirmed Petitioner's Judgment of Conviction. Remittitur issued on  
5 December 14, 2010.

6 On June 16, 2011, Petitioner filed a pro per Post-Conviction Petition for Writ of Habeas  
7 Corpus. The State filed its Response on August 9, 2011. On August 25, 2011, the district court  
8 denied Petitioner's Petition. The Findings of Fact, Conclusions of Law and Order was filed on  
9 November 9, 2011.

10 Petitioner filed a Notice of Appeal appealing the denial of the Petition on September  
11 22, 2011. On April 6, 2012, the Nevada Supreme Court ordered the denial of Petitioner's  
12 Petition reversed and remanded the case back for appointment of counsel, without reaching  
13 the merits of any other claims.

14 On May 15, 2012, Matthew Carling, Esq., was appointed as counsel. On November 2,  
15 2015, Petitioner filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus. The  
16 State filed its Response on January 15, 2016. Petitioner filed his Reply on February 19, 2016.  
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18 an evidentiary hearing on May 6, 2016, the district court denied Petitioner's Petition. The  
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25 2017, the district court filed an Amended Findings of Fact, Conclusions of Law and Order.

26 On July 31, 2020, Petitioner filed a Motion to Withdraw Counsel, Re-Sentencing  
27 Pursuant to A.B. 236, and Appointment of Counsel. The State filed its Opposition on August  
28 18, 2020. On August 25, 2020, the district court denied Petitioner's Motions. The Order was

1 entered on September 2, 2020. Petitioner filed a Notice of Appeal on September 24, 2020,  
2 appealing the denial of his Motions. On October 14, 2020, the Nevada Supreme Court  
3 dismissed the appeal because the Court lacked jurisdiction to consider the appeal. Remittitur  
4 issued November 16, 2020.

5 On January 5, 2021, Petitioner filed the instant second Petition for Writ of Habeas  
6 Corpus (hereinafter "Second Petition"). The State filed its Response on May 4, 2021.  
7 Following a hearing on July 8, 2021, this Court now finds and concludes as follows:

### 8 **AUTHORITY**

#### 9 **I. THIS SECOND PETITION IS TIME-BARRED**

10 Petitioner's instant Second Petition for Writ of Habeas Corpus was not filed within one  
11 year of the filing of the Judgment of Conviction. Thus, the Petition is time-barred. Pursuant to  
12 NRS 34.726(1):

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

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

19 The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain  
20 meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the  
21 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from  
22 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.  
23 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

24 The one-year time limit for preparing petitions for post-conviction relief under NRS  
25 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),  
26 the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite  
27 evidence presented by the defendant that he purchased postage through the prison and mailed  
28 the petition within the one-year time limit.

1 In the instant case, Petitioner filed a direct appeal, and Remittitur issued on December  
2 14, 2010. Petitioner filed the instant Petition on January 5, 2021—over eleven years after the  
3 Remittitur issued. Thus, the instant second Petition is time-barred. Absent a showing of good  
4 cause to excuse this delay, the instant Petition is dismissed.

5 **II. THIS SECOND PETITION IS BARRED AS SUCCESSIVE**

6 NRS 34.810(2) reads:

7 A second or successive petition *must be dismissed* if the judge or  
8 justice determines that it fails to allege new or different grounds  
9 for relief and that the prior determination was on the merits or, if  
10 new and different grounds are alleged, the judge or justice finds  
11 that the failure of the petitioner to assert those grounds in a prior  
12 petition constituted an abuse of the writ.

13 (emphasis added).

14 Second or successive petitions are petitions that either fail to allege new or different  
15 grounds for relief and the grounds have already been decided on the merits or that allege new  
16 or different grounds but a judge or justice finds that the petitioner's failure to assert those  
17 grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions  
18 will only be decided on the merits if the petitioner can show good cause and prejudice. NRS  
19 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v.  
20 State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that “where a defendant  
21 previously has sought relief from the judgment, the defendant’s failure to identify all grounds  
22 for relief in the first instance should weigh against consideration of the successive motion.”)

23 The Nevada Supreme Court has stated: “Without such limitations on the availability of  
24 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-  
25 conviction remedies. In addition, meritless, successive and untimely petitions clog the court  
26 system and undermine the finality of convictions.” Lozada, 110 Nev. at 358, 871 P.2d at 950.  
27 The Nevada Supreme Court recognizes that “[u]nlike initial petitions which certainly require  
28 a careful review of the record, successive petitions may be dismissed based solely on the face  
of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words,  
if the claim or allegation was previously available with reasonable diligence, it is an abuse of

1 the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991).  
2 Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

3 Here, as discussed supra, Section I., this is Petitioner’s second Post-Conviction Petition.  
4 Petitioner did not raise this claim on direct appeal or in his first Petition. He only raises it for  
5 the first time now, eleven years later. Petitioner recently raised this exact issue in his Motion  
6 for Re-Sentencing Pursuant to A.B. 236, which was denied by the district court on August 25,  
7 2020. Accordingly, this second Petition is an abuse of the writ, procedurally barred, and  
8 therefore, dismissed.

### 9 III. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

10 The Nevada Supreme Court has held that the district court has a *duty* to consider  
11 whether a defendant’s post-conviction petition claims are procedurally barred. State v. Eighth  
12 Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court  
13 found that “[a]pplication of the statutory procedural default rules to post-conviction habeas  
14 petitions is mandatory,” noting:

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

18 Id. Additionally, the Court noted that procedural bars “cannot be ignored [by the district court]  
19 when properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court  
20 has granted no discretion to the district courts regarding whether to apply the statutory  
21 procedural bars; the rules *must* be applied.

22 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).  
23 There the Court ruled that the defendant’s petition was “untimely, successive, and an abuse of  
24 the writ” and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307  
25 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant’s  
26 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The  
27 procedural bars are so fundamental to the post-conviction process that they must be applied  
28

1 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.  
2 Therefore, application of the procedural bars is mandatory.

#### 3 IV. THE STATE AFFIRMATIVELY PLEADS LACHES

4 Certain limitations exist on how long a defendant may wait to assert a post-conviction  
5 request for relief. Consideration of the equitable doctrine of laches is necessary in determining  
6 whether a defendant has shown 'manifest injustice' that would permit a modification of a  
7 sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated:  
8 "Application of the doctrine to an individual case may require consideration of several factors,  
9 including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied  
10 waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3)  
11 whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev.  
12 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

13 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
14 exceeding five years [elapses] between the filing of a judgment of conviction, an order  
15 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of  
16 conviction and the filing of a petition challenging the validity of a judgment of conviction..."  
17 The Nevada Supreme Court has observed, "[P]etitions that are filed many years after  
18 conviction are an unreasonable burden on the criminal justice system. The necessity for a  
19 workable system dictates that there must exist a time when a criminal conviction is final."  
20 Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the  
21 statute requires the State plead laches. NRS 34.800(2).

22 The State affirmatively pleads laches in this case given that over eleven years has  
23 elapsed between the issuing of Remittitur and the filing of the second Petition. In order to  
24 overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving  
25 a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540,  
26 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus  
27 far, Petitioner has failed to meet that burden.  
28

1 As discussed supra, Section I., the one-year time bar began to run from the date the of  
2 the Remittitur on December 14, 2010. The second Petition was filed on January 5, 2021 – *over*  
3 *eleven years* later. Because more than eleven years have elapsed between the Remittitur and  
4 the filing of the instant second Petition, NRS 34.800 directly applies in this case, and a  
5 presumption of prejudice to the State arises. Therefore, pursuant to NRS 34.800, this second  
6 Petition is dismissed under the doctrine of laches.

7 **V. PETITIONER CANNOT ESTABLISH GOOD CAUSE TO OVERCOME**  
8 **THE MANDATORY PROCEDURAL BARS**

9 A showing of good cause and prejudice may overcome procedural bars. However,  
10 Petitioner cannot demonstrate good cause to explain why his Petition was untimely.

11 “To establish good cause, appellants must show that an impediment external to the  
12 defense prevented their compliance with the applicable procedural rule. A qualifying  
13 impediment might be shown where the factual or legal basis for a claim *was not reasonably*  
14 *available at the time of default.*” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)  
15 (emphasis added). The Court continued, “appellants cannot attempt to manufacture good  
16 cause[.]” Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a “substantial  
17 reason; one that affords a legal excuse.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503,  
18 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any  
19 delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

20 A petitioner raising good cause to excuse procedural bars must do so within a  
21 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34  
22 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see  
23 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably  
24 available to the petitioner during the statutory time period did not constitute good cause to  
25 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good  
26 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,  
27 453 120 S. Ct. 1587, 1592 (2000).

28 //

1 Further, to establish prejudice, the defendant must show “not merely that the errors of  
2 [the proceedings] created possibility of prejudice, but that they worked to his actual and  
3 substantial disadvantage, in affecting the state proceedings with error of constitutional  
4 dimensions.” Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United  
5 States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

6 In the instant case, Petitioner cannot demonstrate good cause to overcome the  
7 mandatory procedural bars because he cannot demonstrate that this claim was not reasonably  
8 available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525. Petitioner’s one and  
9 only claim is that he is entitled to relief under A.B. 236. Second Petition, at 6. A.B. 236 cannot  
10 provide good cause because it is inapplicable to Petitioner. Petitioner’s Amended Judgement  
11 of Conviction was filed on April 6, 2009—well before the effective date of A.B. 236.  
12 Therefore, Petitioner cannot establish good cause, and the Petition is denied as time barred.

#### 13 VI. PETITIONER CANNOT ESTABLISH PREJUDICE

14 Petitioner’s only claim is that his sentence does not comport with the amendments made  
15 by A.B. 236. Second Petition, at 6. However, A.B. 236 was not in effect at the time of  
16 Petitioner’s conviction and sentence and is inapplicable to Petitioner’s case.

17 It is well established that, under Nevada law, the proper penalty for a criminal  
18 conviction is the penalty in effect at the time of the commission of the offense and not the  
19 penalty in effect at the time of sentencing. State v. Second Judicial Dist. Ct. (“Pullin”), 124  
20 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). Unless the Legislature clearly expresses its intent  
21 to apply a law retroactively, Nevada law requires the application of the law in effect at the  
22 time of the commission of the crime. Id.

23 Petitioner’s sentence cannot be modified based on the enactment of A.B. 236, which went  
24 into effect on July 1, 2019. The Legislature did not clearly express its intent to apply the law  
25 retroactively. Therefore, pursuant to Nevada law, the proper penalty for the Petitioner’s  
26 conviction is that which was in effect at the time of the commission of the crime. In the instant  
27 case, the Court sentenced Petitioner, for multiple convictions of Possession of Stolen Property,  
28 under the Large Habitual Statute, to a maximum of life with a minimum parole eligibility of

ten (10) years in the Nevada Department of Corrections. This sentence falls within the statutory sentencing guidelines because A.B. 236 is not applied retroactively. See NRS 207.010. Therefore, Petitioner cannot establish prejudice to overcome the mandatory procedural bars.

**VII. PETITIONER'S CLAIM IS WAIVED FOR FAILING TO BE RAISED  
ON DIRECT APPEAL**

Petitioner's only claim is that he is entitled to relief under A.B. 236. Second Petition, at 6. Pursuant to NRS 34.810:

1. The court shall dismiss a petition if the court determines that:

(a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

(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 postconviction relief; or

(3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

2. 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.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

The petitioner shall include in the petition all prior proceedings in which the petitioner challenged the same conviction or sentence.

4. The court may dismiss a petition that fails to include any prior proceedings of which the court has knowledge through the record of the court or through the pleadings submitted by the respondent.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a 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) (emphasis added)



1 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A  
2 court must dismiss a habeas petition if it presents claims that either were or could have been  
3 presented in an earlier proceeding, unless the court finds both cause for failing to present the  
4 claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State,  
5 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

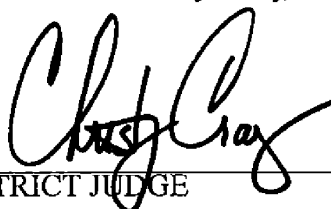
6 Furthermore, substantive claims are beyond the scope of habeas and waived. NRS  
7 34.724(2)(a); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752,  
8 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148,  
9 979 P.2d 222 (1999). Under NRS 34.810(3), a defendant may only escape these procedural  
10 bars if they meet the burden of establishing good cause and prejudice. Where a defendant does  
11 not show good cause for failure to raise claims of error upon direct appeal, the district court is  
12 not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536  
13 P.2d 1025 (1975).

14 Here, Petitioner cannot establish good cause or prejudice to escape the procedural  
15 defaults of this claim. Even so, the claim itself is not just time-barred, but is a substantive claim  
16 that goes beyond the scope of a habeas petition. Thus, this Petition is denied.

17 **ORDER**

18 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief  
19 shall be, and it is, hereby denied.

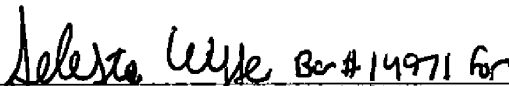
Dated this 28th day of July, 2021

20   
21  
22 DISTRICT JUDGE

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

2B9 B27 8BAB 14F6  
Christy Craig  
District Court Judge

25 BY

  
26 JONATHAN VANBOSKERCK  
27 Chief Deputy District Attorney  
Nevada Bar #006528

28 //

1 CERTIFICATE OF SERVICE

2 I certify that on the 27<sup>th</sup> day of July, 2021, I mailed a copy of the foregoing proposed  
3 Findings of Fact, Conclusions of Law, and Order to:

4 BRYAN FERGASON, NDC #96803  
5 HDSP  
6 P.O. BOX 650  
7 INDIAN SPRINGS, NV 89070

8  
9 BY



Secretary for the District Attorney's Office

10  
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28 06F21801C/bs/JV/ckb/L4

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA  
5

6 Bryan Fergason, Plaintiff(s)

CASE NO: A-21-827365-W

7 vs.

DEPT. NO. Department 32

8 State of Nevada, Defendant(s)

9  
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District  
12 Court. The foregoing Finding of Fact and Conclusions of Law was served via the court's  
13 electronic eFile system to all recipients registered for e-Service on the above entitled case as  
14 listed below:

15 Service Date: 7/28/2021

16 Department XXXII

Dept32LC@clarkcountycourts.us

ST 10

Electronically Filed  
08/03/2021

*Alvin S. Shinn*  
CLERK OF THE COURT

1 Bryan Ferguson #96803

In Proper Person

2 P.O. Box 650 H.D.S.P.  
3 Indian Springs, Nevada 89018

4  
5 8th DISTRICT COURT

6 Clark COUNTY NEVADA

7  
8 Bryan Ferguson,

9 Plaintiff,

10 -v-

11 State of Nevada,

12 Defendant.

Case No. A-21-827365-W

Dept. No. 23C Courtroom 16D

Docket \_\_\_\_\_

13  
14 NOTICE OF APPEAL

15 Notice is hereby given that the Bryan, Ferguson

16 96803, by and through himself in proper person, does now appeal

17 to the Supreme Court of the State of Nevada, the decision of the District

18 Court Denied Writ of Habeas Corpus

19  
20  
21 Dated this date, 7-23-21

22  
23 Respectfully Submitted,

24  
25 *Bryan Ferguson*  
In Proper Person

Bryan Ferguson #96803

P.O. Box 650 H.D.S.P.

Indian Springs, NV 89070

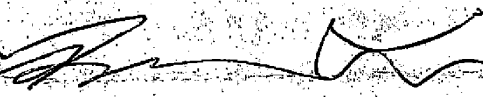
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AUG 02 2021

**CERTIFICATE OF SERVICE BY MAILING**

I, Bryan Ferguson, hereby certify, pursuant to NRCP 5(b), that on this 23  
day of July, 2021, I mailed a true and correct copy of the foregoing "Notice of  
Appeal Denied Writ of Habeas Corpus  
by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,  
addressed as follows:

Steven D. Grierson  
Clerk of the Court  
200 Lewis Ave, 3rd floor  
Las Vegas NV 89155-1150

DATED: this 23 day of July, 2021

  
Bryan Ferguson # 96813  
/In Propria Persona  
Post Office box 650 [HDSP]  
Indian Springs, Nevada 89018

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Notice of

Appeal Denied writ of Habeas corpus  
(Title of Document)

filed in District Court Case number A-21-827365-W

☒ Does not contain the social security number of any person.

-OR-

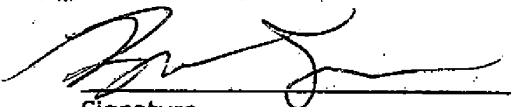
☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-or-

B. For the administration of a public program or for an application  
for a federal or state grant.

  
Signature

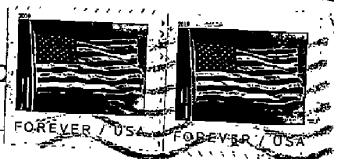
7-23-21  
Date

Bryan Ferguson #96803  
Print Name

Plaintiff  
Title

Bryan Ferguson #96803  
High Desert State Prison  
P.O. Box 650  
Indian Springs, NV 89070

LAS VEGAS NV 890  
27 JUL 2021 PM 4



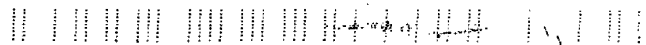
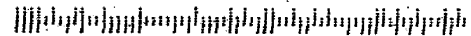
Steven D Grierson  
Clerk of the Court  
200 Lewis Avenue, 3rd floor  
Las Vegas, NV 89155-1160

HIGH DESERT STATE PRISON  
JUN 26 2021  
UNIT 7 A/B

RECEIVED  
AUG - 2 2021

CLERK OF THE COURT

89101-630000





1 ASTA

2  
3  
4  
5  
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**  
7 **STATE OF NEVADA IN AND FOR**  
8 **THE COUNTY OF CLARK**  
9

10 BRYAN FERGASON,

11 Plaintiff(s),

12 vs.

13 STATE OF NEVADA; CALVIN JOHNSON,  
14 WARDEN HDSP,

15 Defendant(s),

Case No: A-21-827365-W

Dept No: XXXII

16  
17 **CASE APPEAL STATEMENT**  
18

19 1. Appellant(s): Bryan Fergason

20 2. Judge: Christy Craig

21 3. Appellant(s): Bryan Fergason

22 Counsel:

23 Bryan Fergason 396803  
24 P.O. Box 650  
25 Indian Springs, NV 89070

26 4. Respondent (s): State of Nevada; Calvin Johnson, Warden HDSP

27 Counsel:

28 Steven B. Wolfson, District Attorney  
200 Lewis Ave.



Las Vegas, NV 89155-2212

5. Appellant(s)'s Attorney Licensed in Nevada: N/A  
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes  
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis\*\*: N/A  
*\*\*Expires 1 year from date filed*  
Appellant Filed Application to Proceed in Forma Pauperis: No  
Date Application(s) filed: N/A

9. Date Commenced in District Court: January 5, 2021

10. Brief Description of the Nature of the Action: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 52788, 52877, 53848, 57538, 58625, 59264, 59871,  
59900, 59910, 64165, 64255, 65827, 66986, 71222, 72914, 73388, 74469, 78299, 78312,  
81048, 81852, 82757

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 4 day of August 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk  
200 Lewis Ave  
PO Box 551601  
Las Vegas, Nevada 89155-1601  
(702) 671-0512

cc: Bryan Ferguson

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**March 04, 2021**

---

A-21-827365-W      Bryan Fergason, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**March 04, 2021      11:00 AM      Petition for Writ of Habeas  
Corpus**

**HEARD BY:** Craig, Christy

**COURTROOM:** RJC Courtroom 16D

**COURT CLERK:** Kathryn Hansen-McDowell

**RECORDER:** Kaihla Berndt

**REPORTER:**

**PARTIES**

**PRESENT:** Thomas, Morgan B.A.      Attorney

**JOURNAL ENTRIES**

- Ms. Thomas requested additional time to respond to the Petitioner's Petition. COURT GRANTED request and SET the following briefing schedule.

State's Response due: 05/06/2021

Petitioner's Reply due: 06/10/2021

Hearing date: 07/08/2021

07/08/2021 11:00 AM HEARING: WRIT OF HABEAS CORPUS (POST CONVICTION)

CLERK'S NOTE: The above minute order has been distributed to: Bryan Fergason #95803, HDSP, PO Box 650, Indian Springs, NV 89070. 3/10/21 km

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**July 08, 2021**

---

A-21-827365-W      Bryan Fergason, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

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**July 08, 2021      11:00 AM      Hearing      Hearing: Writ of  
HAb eas Corpus (Post  
Conviction)**

**HEARD BY:** Craig, Christy

**COURTROOM:** RJC Courtroom 16D

**COURT CLERK:** Andrea Natali

**RECORDER:** Kaihla Berndt

**REPORTER:**

**PARTIES**

**PRESENT:** Lexis, Chad N.      Attorney

**JOURNAL ENTRIES**

- Petitioner not present, incarcerated in the Nevada dept. of Corrections (NDC).

COURT ORDERED, writ DENIED as it was time barred and barred as a successive petition where there were no new grounds raised; DIRECTED, Mr. Lexis to prepare the order.

CLERK'S NOTE: The foregoing minutes were distributed via general mail to the following party:  
Bryan Fergason #96803  
PO Box 650 HDSP  
Indian Springs, NV 89070  
(7/19/21 amn).

# Certification of Copy and Transmittal of Record

State of Nevada }  
County of Clark } SS:

Pursuant to the Supreme Court order dated August 18, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 65.

BRYAN FERGASON,

Plaintiff(s),

vs.

STATE OF NEFADA; CALVIN JOHNSON,  
WARDEN HDSP,

Defendant(s),

Case No: A-21-8217365-W

Dept. No: XXXII

now on file and of record in this office.

**IN WITNESS THEREOF**, I have hereunto  
Set my hand and Affixed the seal of the  
Court at my office, Las Vegas, Nevada  
This 30 day of August 2021.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk