

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

NARCUS WESLEY,

Appellant,

Vs.

THE STATE OF NEVADA,

Respondent

Case No.: 82690

Electronically Filed  
Sep 24 2021 09:26 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANT'S APPENDIX VOL. 7**

(Appeal from Judgment of Conviction)

**ATTORNEY FOR APPELLANT**

BRET O. WHIPPLE, ESQ.  
JUSTICE LAW CENTER  
1100 South 10<sup>th</sup> Street  
Las Vegas, NV 89104  
Phone: 702-731-0000  
Fax: 702-974-4008

**ATTORNEY FOR RESPONDENT**

STEVEN WOLFSON, ESQ.  
District Attorney Clark County  
200 Lewis Ave.  
Las Vegas, NV 89155

AARON D. FORD  
Nevada Attorney General  
100 North Carson Street  
Carson City, Nevada  
(775) 684-1265

**APPENDIX VOL. 7**

2021-02-23 Findings of Fact and Conclusions of Law.....001269-001277

2021-02-24 Notice of Entry of Order.....001278-001287

DATED this 24th day of September, 2021.

/s/ BRET O. WHIPPLE, ESQ.

Bar No. 6168

*Heather S. Hume*

CLERK OF THE COURT

**FFCO**

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #1565  
JOHN NIMAN  
Deputy District Attorney  
Nevada Bar #14408  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,  
  
Plaintiff,

-vs-

**NARCUS WESLEY,  
#1022289**

Defendant.

CASE NO: **A-20-824615-W  
07C232494-2**

DEPT NO: **XXI**

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

DATE OF HEARING: **JANUARY 14, 2021**  
TIME OF HEARING: **1:30 PM**

THIS CAUSE having presented before the HONORABLE CLARK NEWBERRY,  
District Judge, on the 14<sup>th</sup> day of January, 2021; Petitioner not present, proceeding IN  
PROPER PERSON; Respondent represented by STEVEN B. WOLFSON, Clark County  
District Attorney, by and through HETTY WONG, Chief Deputy District Attorney; and  
having considered the matter, including briefs, transcripts, arguments of counsel, and  
documents on file herein, the Court makes the following Findings of Fact and Conclusions of  
Law:

//

//

//

1 **STATEMENT OF THE CASE**

2 On April 20, 2007, the State filed an Information charging Narcus Wesley (hereinafter  
3 “Petitioner”) and Delarian Kameron Wilson (hereinafter “Wilson”) with: Count 1 –  
4 Conspiracy to Commit Burglary; Count 2 – Conspiracy to Commit Robbery; Counts 3 and 11  
5 – Burglary While in Possession of a Deadly Weapon; Counts 4, 6, 7, and 9 – Robbery with  
6 Use of A Deadly Weapon; Counts 5 and 8 – Assault with Use of a Deadly Weapon; Count 10  
7 – First Degree Kidnapping with Use of a Deadly Weapon; Counts 12-15, and 17 – Sexual  
8 Assault with Use of a Deadly Weapon; Count 16 – Coercion with Use of a Deadly Weapon;  
9 and Count 18 – Open or Gross Lewdness with Use of a Deadly Weapon. Petitioner’s Co-  
10 Defendant, Wilson, later entered into negotiations with the State and plead guilty to two (2)  
11 counts of Robbery with Use of a Deadly Weapon and one (1) count of Sexual Assault.

12 Petitioner’s jury trial began on April 9, 2008 and concluded on April 18, 2008. On April  
13 10, the State filed the Second Amended Information. The jury convicted Petitioner of all  
14 eighteen (18) counts contained in the Second Amended Information.

15 On July 3, 2008, Petitioner was adjudged guilty of all eighteen (18) counts and the  
16 district court sentenced Petitioner as follows<sup>1</sup>: as to Counts 1 and 18 – twelve (12) months; as  
17 to Counts 2, 3, and 11 – twenty-eight (28) to seventy-two (72) months; as to Counts 4, 6, 7,  
18 and 9 – sixty (60) to one hundred eighty (180) months, plus an equal and consecutive term of  
19 sixty (60) to one hundred eighty (180) months for the use of a deadly weapon; as to Counts 5  
20 and 8 – twenty-four (24) to seventy-two (72) months; as to Count 10 – seventy-two (72) to one  
21 hundred eighty (180) months, plus an equal and consecutive term of seventy-two (72) to one  
22 hundred eighty (180) months for the use of a deadly weapon; as to Counts 12-15, and 17 – ten  
23 (10) years to life, plus an equal and consecutive term of ten (10) years to life for the use of a  
24 deadly weapon; and as to Count 16 – twenty-four (24) to seventy-two (72) months, plus an  
25 equal and consecutive term of twenty-four (24) to seventy-two (72) months for the use of a  
26 deadly weapon; all counts to run concurrently. The Judgment of Conviction was filed on July

27  
28 <sup>1</sup> The State filed a Motion to Correct Illegal Sentence as to Counts 12-15, and 17, as the court previously sentenced Petitioner to a prison term of eight (8) to twenty (20) years instead of ten (10) to twenty (20) years as called for by Statute. The court corrected the sentence at a hearing on September 23, 2008, at which Petitioner was present with his counsel. The corrected sentence is listed above.

1 18, 2008, and an Amended Judgment of Conviction reflecting a correction in the sentence to  
2 Counts 12-15, and 17 was filed on October 8, 2008. Petitioner filed a Notice of Appeal from  
3 the jury verdict, the sentencing, and all pre-trial and post-trial rulings on July 25, 2008.<sup>2</sup> On  
4 March 11, 2010, the Nevada Supreme Court filed an Order affirming Petitioner's conviction  
5 (Case No. 52127). Remittitur was issued on April 8, 2010.

6 On September 9, 2010, Petitioner filed a pro per Petition for Writ of Habeas Corpus, a  
7 Motion for Appointment of Counsel, and a Request for an Evidentiary Hearing. On December  
8 6, 2010, the State filed its Response. On December 7, 2010, the district court denied the  
9 Petition. On December 28, 2010, Petitioner filed a Notice of Appeal from the Order denying  
10 the Petition for post-conviction relief. On January 4, 2011, a Findings of Fact, Conclusions of  
11 Law, and Order was filed. On March 1, 2011, following an Order of Limited Remand for  
12 Appointment of Counsel regarding appointment of counsel for Petitioner's post-conviction  
13 appeal, the district court appointed Mr. Oram. On January 16, 2013, the Nevada Supreme  
14 Court issued an Order of Affirmance; remittitur was issued on February 12, 2013.

15 On November 12, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus  
16 Challenging the Erroneous Jury Instruction Pursuant to NRS 193.165 and NRS 34.360[.] The  
17 State filed its Response on December 18, 2020. The matter came before the court on January  
18 14, 2021, and the court rules as follows:

## 19 ANALYSIS

### 20 **I. PETITIONER'S SECOND HABEAS PETITION IS PROCEDURALLY** 21 **BARRED**

#### 22 **A. Petitioner's Claims are Waived.**

23 As an initial matter, claims other than challenges to the validity of a guilty plea and  
24 ineffective assistance of trial and appellate counsel must be raised on direct appeal "or they  
25 will be considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752,  
26 877 P.2d 1058, 1059 (1994) (disapproved on other grounds by Thomas v. State, 115 Nev. 148,

---

27 <sup>2</sup> For purposes of clarification, Petitioner's trial counsel were Deputy Public Defenders Jeffrey Banks (hereinafter "Mr. Banks") and  
28 Casey Landis (hereinafter "Mr. Landis"). Counsel for Petitioner's direct appeal were Dan Winder (hereinafter "Mr. Winder") and Arnold  
Weinstock (hereinafter "Mr. Weinstock").

1 979 P.2d 222 (1999)); see also NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans v. State, 117  
2 Nev. 609, 646–47, 29 P.3d 498, 523 (2001). Here, Petitioner offered substantive claims in the  
3 instant Second Petition that are now waived due to his failure to raise them on direct appeal.  
4 Accordingly, his Second Petition is denied.

5 **B. The Instant Second Petition is Untimely.**

6 NRS 34.726(1) states that “unless there is good cause shown for delay, a petition that  
7 challenges the validity of a judgment or sentence must be filed within 1 year after entry of the  
8 judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after  
9 the Supreme Court issues its remittitur.” The one-year time bar is strictly construed and  
10 enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that the  
11 “clear and unambiguous” provisions of NRS 34.726(1) demonstrate an “intolerance toward  
12 perpetual filing of petitions for relief, which clogs the court system and undermines the finality  
13 of convictions.” Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). For cases that  
14 arose before NRS 34.726 took effect on January 1, 1993, the deadline for filing a petition was  
15 extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

16 The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev.  
17 590, 593–96, 53 P.3d 901, 902–04 (rejected post-conviction petition filed two days late  
18 pursuant to the “clear and unambiguous” provisions of NRS 34.726(1)). Further, the District  
19 Courts have a duty to consider whether post-conviction claims are procedurally barred. State  
20 v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The  
21 Nevada Supreme Court has found that “[a]pplication of the statutory procedural default rules  
22 to post-conviction habeas petitions is mandatory,” noting:

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

26 Id. at 231, 112 P.3d at 1074. Additionally, the Court held that procedural bars “cannot be  
27 ignored when properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme  
28 Court has granted no discretion to the District Courts regarding whether to apply the statutory

1 procedural bars. Moreover, parties in a post-conviction habeas proceeding cannot stipulate to  
2 disregard the procedural default rules. State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676,  
3 681 (2003).

4 Here, the Judgment of Conviction was filed on July 18, 2008, and an Amended  
5 Judgment of Conviction was filed on October 8, 2008. On March 11, 2010, the Nevada  
6 Supreme Court filed an Order affirming Petitioner's conviction; remittitur was issued on April  
7 8, 2010. Accordingly, Petitioner had until April 8, 2011 to file a Petition. The instant Petition  
8 was not filed until November 12, 2020 – over nine (9) years after the deadline. Therefore,  
9 absent a showing of good cause and prejudice, the instant Second Petition must be denied as  
10 untimely.

11 **C. The Instant Second Petition is Successive and/or an Abuse of the Writ.**

12 Under NRS 34.810(2) “[a] second or successive petition must be dismissed if the judge  
13 or justice determines that it fails to allege new or different grounds for relief and that the prior  
14 determination was on the merits or, if new and different grounds are alleged, the judge or  
15 justice finds that the failure of the petitioner to assert those grounds in a prior petition  
16 constituted an abuse of the writ.” Second or successive petitions will only be decided on the  
17 merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State,  
18 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). The Nevada Supreme Court has stated: “Without  
19 such limitations on the availability of post-conviction remedies, prisoners could petition for  
20 relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive  
21 and untimely petitions clog the court system and undermine the finality of convictions.”  
22 Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that  
23 “[u]nlike initial petitions which certainly require a careful review of the record, successive  
24 petitions may be dismissed based solely on the face of the petition.” Ford v. Warden, 111 Nev.  
25 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously  
26 available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later  
27 petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is  
28 mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

1 Here, Petitioner previously filed a Petition on September 9, 2010. To the extent that any  
2 claims raised were raised previously and denied on the merits, said claims are successive and  
3 would be governed by *res judicata* and/or law of the case.<sup>3</sup> To the extent that Petitioner is  
4 raising new claims, this is an abuse of the writ, as the claims *could* have been raised in the  
5 previous Petition. Moreover, this court finds that Petitioner *should* have submitted all the  
6 arguments at the time the original writ was filed. Therefore, absent a showing of good cause  
7 and prejudice, Petitioner's claims are procedurally barred and must be denied.

## 8 **II. PETITIONER HAS FAILED TO DEMONSTRATE GOOD CAUSE AND** 9 **PREJUDICE**

10 A showing of good cause and prejudice may overcome procedural bars. To show good  
11 cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat  
12 the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly  
13 prejudice[d]" if the petition is dismissed as untimely. See NRS 34.726(1).

14 "To establish good cause, appellants must show that an impediment external to the  
15 defense prevented their compliance with the applicable procedural rule. A qualifying  
16 impediment might be shown where the factual or legal basis for a claim was not reasonably  
17 available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)  
18 Moreover, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526;  
19 see also Hathaway v. State, 119 Nev. 248, 252–53, 71 P.3d 503, 506–07 (2003) (stating that a  
20 claim reasonably available to the petitioner during the statutory time period did not constitute  
21 good cause to excuse a delay in filing).

22 In addition to establishing good cause, a petitioner must also show actual prejudice  
23 resulting from the errors of which he complains. In other words, in order to establish prejudice,  
24 the defendant must show "not merely that the errors of [the proceedings] created possibility  
25 of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the  
26 state proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952,

27  
28 <sup>3</sup> See Exec. Mgmt. v. Tigor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998); Sealfon v. United States, 332 U.S. 575, 578,  
68 S. Ct. 237, 239 (1948); Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).



1 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct.  
2 1584, 1596 (1982)). To find good cause there must be a “substantial reason; one that affords a  
3 legal excuse.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley  
4 v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)).

5 Moreover, claims asserted in a petition for post-conviction relief must be supported  
6 with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove,  
7 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not  
8 sufficient, nor are those belied and repelled by the record. Id.

9 Here, Petitioner failed to make any claim that there is good cause to overcome the  
10 procedural time bars, nor can he manufacture good cause. The factual and legal basis of his  
11 claims were always reasonably available to him since the filing of the Amended Judgment of  
12 Conviction. Additionally, Petitioner cannot demonstrate actual prejudice as there were no  
13 errors based upon the following reasons:

14 First, Petitioner claims there was insufficient evidence to support a finding that a  
15 firearm was used in the commission of the crimes charged. Petition at 1–2. Specifically,  
16 Petitioner claims that “the State failed to establish that the object portrayed as a gun that was  
17 not produced at trial could fire a projectile by force of an explosion or combustion...” Petition  
18 at 2. Second, Petitioner claimed that the district court erred by instructing the jury that “a  
19 firearm is a deadly weapon and proof of its deadly capabilities is not required.” Petition at 3–  
20 4. Petitioner’s claims are meritless.

21 According to NRS 193.165, a deadly weapon is:

22 (a) Any instrument which, if used in the ordinary manner  
23 contemplated by its design and construction, will or is likely to cause  
substantial bodily harm or death;

24 (b) Any weapon, device, instrument, material or substance which,  
25 under the circumstances in which it is used, attempted to be used or  
26 threatened to be used, is readily capable of causing substantial bodily  
harm or death; or

27 (c) A dangerous or deadly weapon specifically described in NRS  
202.255, 202.265, 202.290, 202.320 or 202.350.

28 //

1 Here, the statute is clear that the State needed to only show one (1) of the three (3)  
2 lineated definitions of a deadly weapon. Regardless, Nevada case law is clear that a firearm is  
3 a deadly weapon. According to Stalley v. State,

4 By the words ‘firearm or other deadly weapon,’ the legislature has  
5 declared that a firearm is a deadly weapon within the contemplation  
6 of the statute. *Proof of its deadly capabilities is not required.* To  
7 require such proof would frustrate the legislative purpose to deter  
crime by providing a greater penalty when a firearm is used in the  
commission of a public offense.

8 91 Nev. 671, 676, 541 P.2d 658, 661–62 (1975) (emphasis added). Moreover, “whether the  
9 gun was actually loaded and capable of firing bullets in a deadly fashion is of no consequence  
10 in determining whether it is a deadly weapon.” Barnhart v. State, 122 Nev. 301, 304–05, 130  
11 P.3d 650, 652 (2006). To the extent that Petitioner is claiming there was no proof that a firearm  
12 was used in this case, his claim also fails. The victims testified repeatedly that Petitioner had  
13 a gun and even threatened to shoot them. See Transcript of Proceedings - Jury Trial, April 9,  
14 10, and 11, 2008 at 650–51, 657–58, 668, 726. For these reasons, Petitioner cannot establish  
15 prejudice as there was no error.

16 **ORDER**

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

19 DATED this \_\_\_\_ day of February, 2021.

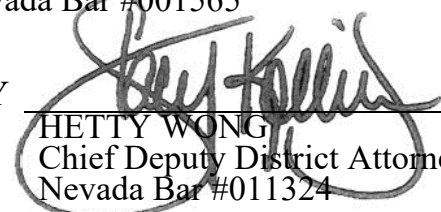
Dated this 23rd day of February, 2021



21 DISTRICT JUDGE

DBB ED4 558B A260  
Tara Clark Newberry  
District Court Judge

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

24 BY  for  
25 HETTY WONG  
26 Chief Deputy District Attorney  
Nevada Bar #011324

27  
28 hjc/SVU

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Narcus Wesley, Plaintiff(s)

CASE NO: A-20-824615-W

7 vs.

DEPT. NO. Department 21

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. The filer has been  
13 notified to serve all parties by traditional means.  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

AA 001277

1 NEO

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA

Electronically Filed  
02/24/2021

4 *Amanda Hampton*  
CLERK OF THE COURT

5 NARCUS S. WESLEY,

6 Petitioner,

Case No: 07C232494-2

Dept No: XXI

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

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

11 PLEASE TAKE NOTICE that on February 23, 2021, the court entered a decision or order in this  
12 matter, a true 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 February 24, 2021.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

17 Amanda Hampton, Deputy Clerk

18  
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 24 day of February 2021, I served a copy of this Notice of Entry on the  
21 following:

22 ☒ By e-mail:

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

24 ☒ The United States mail addressed as follows:

25 Narcus Wesley # 1022289  
P.O. Box 650  
26 Indian Springs, NV 89070

Christopher Oram, Esq.  
520 S. 4<sup>th</sup> St., 2<sup>nd</sup> Floor  
Las Vegas, NV 89101

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

*Heather S. Hume*

CLERK OF THE COURT

**FFCO**

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #1565  
JOHN NIMAN  
Deputy District Attorney  
Nevada Bar #14408  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

**NARCUS WESLEY,**  
**#1022289**

Defendant.

CASE NO: **A-20-824615-W**  
**07C232494-2**

DEPT NO: **XXI**

**FINDINGS OF FACT, CONCLUSIONS OF**

**LAW, AND ORDER**

DATE OF HEARING: **JANUARY 14, 2021**

TIME OF HEARING: **1:30 PM**

THIS CAUSE having presented before the HONORABLE CLARK NEWBERRY, District Judge, on the 14<sup>th</sup> day of January, 2021; Petitioner not present, proceeding IN PROPER PERSON; Respondent represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through HETTY WONG, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

//

//

//

1 **STATEMENT OF THE CASE**

2 On April 20, 2007, the State filed an Information charging Narcus Wesley (hereinafter  
3 “Petitioner”) and Delarian Kameron Wilson (hereinafter “Wilson”) with: Count 1 –  
4 Conspiracy to Commit Burglary; Count 2 – Conspiracy to Commit Robbery; Counts 3 and 11  
5 – Burglary While in Possession of a Deadly Weapon; Counts 4, 6, 7, and 9 – Robbery with  
6 Use of A Deadly Weapon; Counts 5 and 8 – Assault with Use of a Deadly Weapon; Count 10  
7 – First Degree Kidnapping with Use of a Deadly Weapon; Counts 12-15, and 17 – Sexual  
8 Assault with Use of a Deadly Weapon; Count 16 – Coercion with Use of a Deadly Weapon;  
9 and Count 18 – Open or Gross Lewdness with Use of a Deadly Weapon. Petitioner’s Co-  
10 Defendant, Wilson, later entered into negotiations with the State and plead guilty to two (2)  
11 counts of Robbery with Use of a Deadly Weapon and one (1) count of Sexual Assault.

12 Petitioner’s jury trial began on April 9, 2008 and concluded on April 18, 2008. On April  
13 10, the State filed the Second Amended Information. The jury convicted Petitioner of all  
14 eighteen (18) counts contained in the Second Amended Information.

15 On July 3, 2008, Petitioner was adjudged guilty of all eighteen (18) counts and the  
16 district court sentenced Petitioner as follows<sup>1</sup>: as to Counts 1 and 18 – twelve (12) months; as  
17 to Counts 2, 3, and 11 – twenty-eight (28) to seventy-two (72) months; as to Counts 4, 6, 7,  
18 and 9 – sixty (60) to one hundred eighty (180) months, plus an equal and consecutive term of  
19 sixty (60) to one hundred eighty (180) months for the use of a deadly weapon; as to Counts 5  
20 and 8 – twenty-four (24) to seventy-two (72) months; as to Count 10 – seventy-two (72) to one  
21 hundred eighty (180) months, plus an equal and consecutive term of seventy-two (72) to one  
22 hundred eighty (180) months for the use of a deadly weapon; as to Counts 12-15, and 17 – ten  
23 (10) years to life, plus an equal and consecutive term of ten (10) years to life for the use of a  
24 deadly weapon; and as to Count 16 – twenty-four (24) to seventy-two (72) months, plus an  
25 equal and consecutive term of twenty-four (24) to seventy-two (72) months for the use of a  
26 deadly weapon; all counts to run concurrently. The Judgment of Conviction was filed on July

27  
28 <sup>1</sup> The State filed a Motion to Correct Illegal Sentence as to Counts 12-15, and 17, as the court previously sentenced Petitioner to a prison  
term of eight (8) to twenty (20) years instead of ten (10) to twenty (20) years as called for by Statute. The court corrected the sentence  
at a hearing on September 23, 2008, at which Petitioner was present with his counsel. The corrected sentence is listed above.

1 18, 2008, and an Amended Judgment of Conviction reflecting a correction in the sentence to  
2 Counts 12-15, and 17 was filed on October 8, 2008. Petitioner filed a Notice of Appeal from  
3 the jury verdict, the sentencing, and all pre-trial and post-trial rulings on July 25, 2008.<sup>2</sup> On  
4 March 11, 2010, the Nevada Supreme Court filed an Order affirming Petitioner's conviction  
5 (Case No. 52127). Remittitur was issued on April 8, 2010.

6 On September 9, 2010, Petitioner filed a pro per Petition for Writ of Habeas Corpus, a  
7 Motion for Appointment of Counsel, and a Request for an Evidentiary Hearing. On December  
8 6, 2010, the State filed its Response. On December 7, 2010, the district court denied the  
9 Petition. On December 28, 2010, Petitioner filed a Notice of Appeal from the Order denying  
10 the Petition for post-conviction relief. On January 4, 2011, a Findings of Fact, Conclusions of  
11 Law, and Order was filed. On March 1, 2011, following an Order of Limited Remand for  
12 Appointment of Counsel regarding appointment of counsel for Petitioner's post-conviction  
13 appeal, the district court appointed Mr. Oram. On January 16, 2013, the Nevada Supreme  
14 Court issued an Order of Affirmance; remittitur was issued on February 12, 2013.

15 On November 12, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus  
16 Challenging the Erroneous Jury Instruction Pursuant to NRS 193.165 and NRS 34.360[.] The  
17 State filed its Response on December 18, 2020. The matter came before the court on January  
18 14, 2021, and the court rules as follows:

## 19 ANALYSIS

### 20 **I. PETITIONER'S SECOND HABEAS PETITION IS PROCEDURALLY** 21 **BARRED**

#### 22 **A. Petitioner's Claims are Waived.**

23 As an initial matter, claims other than challenges to the validity of a guilty plea and  
24 ineffective assistance of trial and appellate counsel must be raised on direct appeal "or they  
25 will be considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752,  
26 877 P.2d 1058, 1059 (1994) (disapproved on other grounds by Thomas v. State, 115 Nev. 148,

---

27 <sup>2</sup> For purposes of clarification, Petitioner's trial counsel were Deputy Public Defenders Jeffrey Banks (hereinafter "Mr. Banks") and  
28 Casey Landis (hereinafter "Mr. Landis"). Counsel for Petitioner's direct appeal were Dan Winder (hereinafter "Mr. Winder") and Arnold  
Weinstock (hereinafter "Mr. Weinstock").

1 979 P.2d 222 (1999)); see also NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans v. State, 117  
2 Nev. 609, 646–47, 29 P.3d 498, 523 (2001). Here, Petitioner offered substantive claims in the  
3 instant Second Petition that are now waived due to his failure to raise them on direct appeal.  
4 Accordingly, his Second Petition is denied.

5 **B. The Instant Second Petition is Untimely.**

6 NRS 34.726(1) states that “unless there is good cause shown for delay, a petition that  
7 challenges the validity of a judgment or sentence must be filed within 1 year after entry of the  
8 judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after  
9 the Supreme Court issues its remittitur.” The one-year time bar is strictly construed and  
10 enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that the  
11 “clear and unambiguous” provisions of NRS 34.726(1) demonstrate an “intolerance toward  
12 perpetual filing of petitions for relief, which clogs the court system and undermines the finality  
13 of convictions.” Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). For cases that  
14 arose before NRS 34.726 took effect on January 1, 1993, the deadline for filing a petition was  
15 extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

16 The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev.  
17 590, 593–96, 53 P.3d 901, 902–04 (rejected post-conviction petition filed two days late  
18 pursuant to the “clear and unambiguous” provisions of NRS 34.726(1)). Further, the District  
19 Courts have a duty to consider whether post-conviction claims are procedurally barred. State  
20 v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The  
21 Nevada Supreme Court has found that “[a]pplication of the statutory procedural default rules  
22 to post-conviction habeas petitions is mandatory,” noting:

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

26 Id. at 231, 112 P.3d at 1074. Additionally, the Court held that procedural bars “cannot be  
27 ignored when properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme  
28 Court has granted no discretion to the District Courts regarding whether to apply the statutory



1 procedural bars. Moreover, parties in a post-conviction habeas proceeding cannot stipulate to  
2 disregard the procedural default rules. State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676,  
3 681 (2003).

4 Here, the Judgment of Conviction was filed on July 18, 2008, and an Amended  
5 Judgment of Conviction was filed on October 8, 2008. On March 11, 2010, the Nevada  
6 Supreme Court filed an Order affirming Petitioner's conviction; remittitur was issued on April  
7 8, 2010. Accordingly, Petitioner had until April 8, 2011 to file a Petition. The instant Petition  
8 was not filed until November 12, 2020 – over nine (9) years after the deadline. Therefore,  
9 absent a showing of good cause and prejudice, the instant Second Petition must be denied as  
10 untimely.

11 **C. The Instant Second Petition is Successive and/or an Abuse of the Writ.**

12 Under NRS 34.810(2) “[a] second or successive petition must be dismissed if the judge  
13 or justice determines that it fails to allege new or different grounds for relief and that the prior  
14 determination was on the merits or, if new and different grounds are alleged, the judge or  
15 justice finds that the failure of the petitioner to assert those grounds in a prior petition  
16 constituted an abuse of the writ.” Second or successive petitions will only be decided on the  
17 merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State,  
18 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). The Nevada Supreme Court has stated: “Without  
19 such limitations on the availability of post-conviction remedies, prisoners could petition for  
20 relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive  
21 and untimely petitions clog the court system and undermine the finality of convictions.”  
22 Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that  
23 “[u]nlike initial petitions which certainly require a careful review of the record, successive  
24 petitions may be dismissed based solely on the face of the petition.” Ford v. Warden, 111 Nev.  
25 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously  
26 available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later  
27 petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is  
28 mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

1 Here, Petitioner previously filed a Petition on September 9, 2010. To the extent that any  
2 claims raised were raised previously and denied on the merits, said claims are successive and  
3 would be governed by *res judicata* and/or law of the case.<sup>3</sup> To the extent that Petitioner is  
4 raising new claims, this is an abuse of the writ, as the claims *could* have been raised in the  
5 previous Petition. Moreover, this court finds that Petitioner *should* have submitted all the  
6 arguments at the time the original writ was filed. Therefore, absent a showing of good cause  
7 and prejudice, Petitioner's claims are procedurally barred and must be denied.

## 8 **II. PETITIONER HAS FAILED TO DEMONSTRATE GOOD CAUSE AND** 9 **PREJUDICE**

10 A showing of good cause and prejudice may overcome procedural bars. To show good  
11 cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat  
12 the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly  
13 prejudice[d]" if the petition is dismissed as untimely. See NRS 34.726(1).

14 "To establish good cause, appellants must show that an impediment external to the  
15 defense prevented their compliance with the applicable procedural rule. A qualifying  
16 impediment might be shown where the factual or legal basis for a claim was not reasonably  
17 available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)  
18 Moreover, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526;  
19 see also Hathaway v. State, 119 Nev. 248, 252–53, 71 P.3d 503, 506–07 (2003) (stating that a  
20 claim reasonably available to the petitioner during the statutory time period did not constitute  
21 good cause to excuse a delay in filing).

22 In addition to establishing good cause, a petitioner must also show actual prejudice  
23 resulting from the errors of which he complains. In other words, in order to establish prejudice,  
24 the defendant must show "not merely that the errors of [the proceedings] created possibility  
25 of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the  
26 state proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952,

27  
28 <sup>3</sup> See Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998); Sealfon v. United States, 332 U.S. 575, 578,  
68 S. Ct. 237, 239 (1948); Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

1 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct.  
2 1584, 1596 (1982)). To find good cause there must be a “substantial reason; one that affords a  
3 legal excuse.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley  
4 v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)).

5 Moreover, claims asserted in a petition for post-conviction relief must be supported  
6 with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove,  
7 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not  
8 sufficient, nor are those belied and repelled by the record. Id.

9 Here, Petitioner failed to make any claim that there is good cause to overcome the  
10 procedural time bars, nor can he manufacture good cause. The factual and legal basis of his  
11 claims were always reasonably available to him since the filing of the Amended Judgment of  
12 Conviction. Additionally, Petitioner cannot demonstrate actual prejudice as there were no  
13 errors based upon the following reasons:

14 First, Petitioner claims there was insufficient evidence to support a finding that a  
15 firearm was used in the commission of the crimes charged. Petition at 1–2. Specifically,  
16 Petitioner claims that “the State failed to establish that the object portrayed as a gun that was  
17 not produced at trial could fire a projectile by force of an explosion or combustion...” Petition  
18 at 2. Second, Petitioner claimed that the district court erred by instructing the jury that “a  
19 firearm is a deadly weapon and proof of its deadly capabilities is not required.” Petition at 3–  
20 4. Petitioner’s claims are meritless.

21 According to NRS 193.165, a deadly weapon is:

22 (a) Any instrument which, if used in the ordinary manner  
23 contemplated by its design and construction, will or is likely to cause  
substantial bodily harm or death;

24 (b) Any weapon, device, instrument, material or substance which,  
25 under the circumstances in which it is used, attempted to be used or  
26 threatened to be used, is readily capable of causing substantial bodily  
harm or death; or

27 (c) A dangerous or deadly weapon specifically described in NRS  
202.255, 202.265, 202.290, 202.320 or 202.350.

28 //

1 Here, the statute is clear that the State needed to only show one (1) of the three (3)  
2 lineated definitions of a deadly weapon. Regardless, Nevada case law is clear that a firearm is  
3 a deadly weapon. According to Stalley v. State,

4 By the words ‘firearm or other deadly weapon,’ the legislature has  
5 declared that a firearm is a deadly weapon within the contemplation  
6 of the statute. *Proof of its deadly capabilities is not required.* To  
7 require such proof would frustrate the legislative purpose to deter  
8 crime by providing a greater penalty when a firearm is used in the  
9 commission of a public offense.

10 91 Nev. 671, 676, 541 P.2d 658, 661–62 (1975) (emphasis added). Moreover, “whether the  
11 gun was actually loaded and capable of firing bullets in a deadly fashion is of no consequence  
12 in determining whether it is a deadly weapon.” Barnhart v. State, 122 Nev. 301, 304–05, 130  
13 P.3d 650, 652 (2006). To the extent that Petitioner is claiming there was no proof that a firearm  
14 was used in this case, his claim also fails. The victims testified repeatedly that Petitioner had  
15 a gun and even threatened to shoot them. See Transcript of Proceedings - Jury Trial, April 9,  
16 10, and 11, 2008 at 650–51, 657–58, 668, 726. For these reasons, Petitioner cannot establish  
17 prejudice as there was no error.

18 **ORDER**

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

21 DATED this \_\_\_\_ day of February, 2021.

Dated this 23rd day of February, 2021



DISTRICT JUDGE

DBB ED4 558B A260  
Tara Clark Newberry  
District Court Judge

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

24 BY

for



HETTY WONG  
Chief Deputy District Attorney  
Nevada Bar #011324

27  
28 hjc/SVU

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Narcus Wesley, Plaintiff(s)

CASE NO: A-20-824615-W

7 vs.

DEPT. NO. Department 21

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. The filer has been  
13 notified to serve all parties by traditional means.  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

AA 001287