

JOEL BURKETT # 16111
Northern Nevada Correctional Center
Post Office Box # 7000
Carson City, Nevada 89702-7000

Electronically Filed
Nov 09 2021 09:09 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

DISTRICT COURT
CLARK COUNTY, NEVADA

JOEL BURKETT,
Petitioner,

VS,

WILLIAM A. GITTERE,
Respondent,

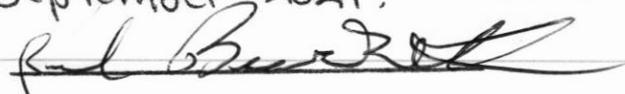
Case No. A-19-788633-W
Dept. No. XII

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, that the Petitioner, JOEL BURKETT, hereby appeals to the Supreme Court of The State of Nevada, from the Judgment (Findings of Fact, Conclusions of Law AND ORDER), entered by the above named Court on September 16, 2021.

The foregoing document does not contain the social security number of any person.

DATED this 24th day of September 2021.

By: 

JOEL BURKETT,
Petitioner, in pro. per.

RECEIVED
NOV - 1 2021

CLERK OF THE COURT

CERTIFICATE OF SERVICE VIA U.S. MAIL

I, JOEL BURKETT, do hereby certify that on this 24th day of September 2021, that I mailed a true and correct copy of the foregoing Notice of Appeal, addressed to:

ALEXANDER CHEN, ESQ (UDA)

% Clark County District Attorney

200 Lewis Avenue

Las Vegas, Nevada 89155-2212

and,

ARRON FORD, ESQ

Nevada Attorney General

100 North Carson Street

Carson City, Nevada 89701-4717

By: 
JOEL BURKETT.

JOEL BURKETT 16111
N.W.C.
P.O. BOX 7000
CARSON CITY, NV
89702

RENO NV 894



RECEIVED

NOV - 1 2021

CLERK OF THE COURT

CLERK, CLARK COUNTY DISTRICT COURT

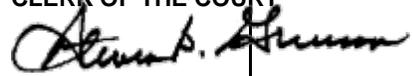
200 LEWIS AVE. 3RD FLOOR

LAS VEGAS, NEVADA

89155

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

10 JOEL BURKETT,

11 Plaintiff(s),

12 vs.

13 WILLIAM A. GITTERE,

14 Defendant(s),
15

Case No: A-19-788633-W

Dept No: XII

16
17 **CASE APPEAL STATEMENT**

18 1. Appellant(s): Joel Burkett

19 2. Judge: Michelle Leavitt

20 3. Appellant(s): Joel Burkett

21 Counsel:

22 Joel Burkett #16111
23 P.O. Box 7000
24 Carson City, NV 89702-7000

25 4. Respondent (s): William A. Gittere

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

- 1
2 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A
3
4 Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A
5
6 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No
7
8 7. Appellant Represented by Appointed Counsel On Appeal: N/A
9
10 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: Yes,
Date Application(s) filed: February 6, 2020
11
12 9. Date Commenced in District Court: February 1, 2019
13
14 10. Brief Description of the Nature of the Action: Civil Writ
Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus
15
16 11. Previous Appeal: Yes
Supreme Court Docket Number(s): 78868
17
18 12. Child Custody or Visitation: N/A
19
20 13. Possibility of Settlement: Unknown

Dated This 3 day of November 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

25 cc: Joel Burkett
26
27
28

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY
CASE NO. A-19-788633-W

Joel Burkett, Plaintiff(s)
 vs.
William A Gittere, Defendant(s)

§
§
§
§
§
§

Location: **Department 12**
 Judicial Officer: **Leavitt, Michelle**
 Filed on: **02/01/2019**
 Cross-Reference Case Number: **A788633**
 Supreme Court No.: **78868**

CASE INFORMATION

Related Cases

81C052190 (Writ Related Case)
 A-19-800052-W (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Case Status: **09/13/2021 Closed**

Statistical Closures

09/13/2021 Other Manner of Disposition
 06/07/2019 Summary Judgment

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	A-19-788633-W
Court	Department 12
Date Assigned	02/01/2019
Judicial Officer	Leavitt, Michelle

PARTY INFORMATION

Plaintiff

Burkett, Joel

Lead Attorneys

Pro Se

Defendant

William A Gittere

Wolfson, Steven B
Retained
 702-455-5320(W)

DATE

EVENTS & ORDERS OF THE COURT

INDEX

EVENTS

- 02/01/2019  Inmate Filed - Petition for Writ of Habeas Corpus
 Party: Plaintiff Burkett, Joel
[1] Petition for Writ of Habeas Corpus (Pursuant to NRS 34.500(2);(9))

- 02/01/2019  Motion for Leave to Proceed in Forma Pauperis
 Filed By: Plaintiff Burkett, Joel
[2] Motion for Leave to Proceed in Forma Pauperis (Confidential)

- 02/01/2019  Affidavit in Support of Application Proceed Forma Pauperis
 Filed By: Plaintiff Burkett, Joel
[3] Affidavit in Support of Motion to Proceed in Forma Pauperis (Confidential)

- 02/07/2019  Motion
 Filed By: Plaintiff Burkett, Joel
[4] Request to file Amended Petition for Writ of Habeas Corpus 34.500(2);(9)

- 03/13/2019  Notice
 Filed By: Plaintiff Burkett, Joel

CASE SUMMARY
CASE NO. A-19-788633-W

[5] Notice of Correction

04/18/2019

 Findings of Fact, Conclusions of Law and Order
[6] Findings of Fact, Conclusions of Law, and Order

04/22/2019

 Notice of Entry
[7] Notice of Entry of Findings of Fact, Conclusions of Law and Order

05/20/2019

 Notice of Appeal
Filed By: Plaintiff Burkett, Joel
[8]

05/22/2019

 Case Appeal Statement
[9]

06/07/2019

 Order to Statistically Close Case
[10] Civil Order to Statistically Close Case

07/24/2019

 Certificate of Service
Filed by: Plaintiff Burkett, Joel
[11] Certificate of Re-Service

02/06/2020

 Petition for Writ of Habeas Corpus
Filed by: Plaintiff Burkett, Joel
[12]

02/06/2020

 Application to Proceed in Forma Pauperis
Filed By: Plaintiff Burkett, Joel
[13]

02/25/2020

 NV Supreme Court Clerks Certificate/Judgment - Affirmed
[14] Nevada Supreme Court Clerk's Certificate/Remittitur Judgment - Affirmed

03/18/2020

 Order for Petition for Writ of Habeas Corpus
[15] Order For Petition for Writ of Habeas Corpus (Post Conviction)

04/10/2020

 Response
Filed by: Defendant William A Gittere
[16] State's Response to Petitioner's Petition for Writ of Habeas Corpus

05/29/2020

 Opposition/Response/Objection/Reply
Filed by: Plaintiff Burkett, Joel
[17] Opposition to States Response

08/07/2020

 Request
Filed by: Plaintiff Burkett, Joel
[18] Request for Submission

09/16/2020

 Motion
Filed By: Plaintiff Burkett, Joel
[19] Notice of Courts' Failure to Enter Written Order Denying Petition for Writ of Habeas Corpus, and Motion for Entry of Written Order

CASE SUMMARY
CASE NO. A-19-788633-W

09/13/2021  Findings of Fact, Conclusions of Law and Order
Filed By: Plaintiff Burkett, Joel
[20] Findings of Fact, Conclusions of Law and Order

09/16/2021  Notice of Entry of Findings of Fact, Conclusions of Law
Filed By: Defendant William A Gittere
[21] Notice of Entry of Findings of Fact, Conclusions of Law and Order

11/02/2021  Notice of Appeal
[22] Notice of Appeal

11/03/2021  Case Appeal Statement
Filed By: Plaintiff Burkett, Joel
Case Appeal Statement

DISPOSITIONS

02/25/2020 **Clerk's Certificate** (Judicial Officer: Leavitt, Michelle)
Debtors: Joel Burkett (Plaintiff)
Creditors: William A Gittere (Defendant)
Judgment: 02/25/2020, Docketed: 02/25/2020
Comment: Supreme Court No 78868 Appeal Affirmed

HEARINGS

05/19/2020  **Minute Order** (8:00 AM) (Judicial Officer: Leavitt, Michelle)
Minute Order - No Hearing Held;
Journal Entry Details:
The court reviewed the pleadings submitted and hereby denies petitioners twelfth Petition For Writ of Habeas Corpus. The petition is time barred. The petition is also successive. Mr. Chen, Esq. to prepare the Order for the court. The hearing scheduled for May 19, 2020 is vacated. CLERK'S NOTE: The above minute order has been distributed to: Alexander.Chen@clarkcountyda.com hvp/5/19/20;

05/19/2020 **CANCELED Petition for Writ of Habeas Corpus** (12:00 PM) (Judicial Officer: Leavitt, Michelle)
Vacated - per Judge

DISTRICT COURT CIVIL COVER SHEET

A-19-788633-W
Dept. XII

County, Nevada

Case No. _____
(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): <i>Joel Burdick</i>	Defendant(s) (name/address/phone): <i>William Giffene</i>
Attorney (name/address/phone):	Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

<p style="text-align: center;">Real Property</p> <p>Landlord/Tenant</p> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant <p>Title to Property</p> <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property <p>Other Real Property</p> <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	<p style="text-align: center;">Negligence</p> <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence <p style="text-align: center;">Malpractice</p> <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	<p style="text-align: center;">Torts</p> <p>Other Torts</p> <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
<p style="text-align: center;">Probate</p> <p><i>(select case type and estate value)</i></p> <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate <p>Estate Value</p> <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	<p style="text-align: center;">Construction Defect & Contract</p> <p>Construction Defect</p> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect <p>Contract Case</p> <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	<p style="text-align: center;">Judicial Review/Appeal</p> <p>Judicial Review</p> <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency <p>Nevada State Agency Appeal</p> <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency <p>Appeal Other</p> <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
<p style="text-align: center;">Civil Writ</p> <p>Civil Writ</p> <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrantum		<p style="text-align: center;">Other Civil Filing</p> <p>Other Civil Filing</p> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

2-11-2019
Date

Prepared by Clerk
Signature of initiating party or representative

See other side for family-related case filings.



1 **FCL**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 ALEXANDER CHEN
6 Chief Deputy District Attorney
7 Nevada Bar #10539
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10
11 Plaintiff,
12
13 -vs-
14
15 JOEL BURKETT, aka,
16 Raymond Haire, #609533
17
18 Defendant.

CASE NO: A-19-788633-W
DEPT NO: XII
(Twelfth Petition)

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

DATE OF HEARING: MAY 19, 2020
TIME OF HEARING: 8:00 AM

18 THIS CAUSE having come on for hearing before the Honorable MICHELLE
19 LEAVITT, District Judge, on the 19 day of MAY, 2020, the Petitioner not being present,
20 proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON,
21 Clark County District Attorney, by and through ALEXANDER CHEN, Chief Deputy
22 District Attorney, and the Court having considered the matter, including briefs, transcripts, ,
23 and documents on file herein, now therefore, the Court makes the following findings of fact
24 and conclusions of law:

25 ///
26 ///
27 ///
28 ///

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

2 **PROCDURAL HISTORY**

3 On January 19, 1981, Joel Burkett (“Petitioner”) was charged with Count 1 – Robbery
4 and Use of a Deadly Weapon in Commission of a Crime (Felony – NRS 200.380, 193.165);
5 Count 2 – First-Degree Kidnapping and Use of Deadly Weapon in Commission of a Crime
6 (Felony – NRS 200.310, 193.165); and Counts 3 and 4 – Sexual Assault (Felony – NRS
7 200.364, 200.366).

8 On May 4, 1981, a jury found Petitioner guilty of all counts.

9 On June 2, 1981, Petitioner was sentenced as follows: Count 1 – 15 years for the
10 Robbery, plus a consecutive 15 years for the Deadly Weapon in Commission of a Crime;
11 Count 2 – life with the possibility of parole, plus a consecutive term of life with the
12 possibility of parole for the Deadly Weapon in Commission of a Crime, to be served
13 consecutive to Count 1; Count 3 – life with the possibility of parole, concurrent to Counts 1
14 and 2; and Count 4 – life with the possibility of parole, concurrent to Counts 1 and 2. The
15 Judgment of Conviction reflecting the same was filed on July 29, 1981.

16 On June 19, 1981, Petitioner appealed the Judgment of Conviction. On April 21,
17 1983, the Nevada Supreme Court dismissed the appeal. Remittitur issued on May 10, 1983.

18 On February 2, 1994, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
19 Conviction) (“First Petition”). On February 28, 1994, the District Court granted in part and
20 denied in part Petitioner’s First Petition.

21 On June 7, 1999, Petitioner filed a second Petition for Writ of Habeas Corpus (Post-
22 Conviction) (“Second Petition”). The State filed its Response on August 4, 1999. On August
23 12, 1999, the District Court denied Petitioner’s Second Petition. On August 18, 1999,
24 Findings of Fact, Conclusions of Law, and Order reflecting the same was filed. Petitioner
25 appealed the denial of his Second Petition on August 31, 1999. The Nevada Supreme Court
26 affirmed the Court’s denial on July 10, 2001. Remittitur issued on August 7, 2001.

27 On November 19, 2001, Petitioner filed a third Petition for Writ of Habeas Corpus
28 (Post-Conviction) (“Third Petition”). On January 23, 2002, the State filed its Response. The

1 District Court denied Petitioner's Third Petition on January 24, 2002. Findings of Fact,
2 Conclusions of Law, and Order reflecting the same was filed on February 14, 2002.
3 Petitioner appealed the Court's denial of his Third Petition on March 20, 2002. On February
4 6, 2003, the Nevada Supreme Court reversed the judgment of the District Court and
5 remanded the matter. Remittitur issued on March 4, 2003.

6 On February 19, 2003, Petitioner filed a fourth Petition for Writ of Habeas Corpus
7 (Post-Conviction) ("Fourth Petition"). On April 3, 2003, the Attorney General filed its
8 Response. On May 1, 2003, the District Court denied Petitioner's Third and Fourth Petitions.
9 Findings of Fact, Conclusions of Law, and Order reflecting the same were filed on May 14,
10 2003, and May 15, 2003 respectively. Petitioner appealed the denial of his Third and Fourth
11 Petitions on May 7, 2003. The Nevada Supreme Court affirmed the Court's denial of
12 Petitioner's Fourth Petition on March 5, 2004. Remittitur issued on March 30, 2004.

13 On September 1, 2004, Petitioner filed a fifth Petition for Writ of Habeas Corpus
14 (Post-Conviction) ("Fifth Petition"). On October 12, 2004, the State filed its Response. On
15 October 19, 2004, the District Court denied Petitioner's Fifth Petition. Findings of Fact,
16 Conclusions of Law, and Order reflecting the same were filed on November 1, 2004.

17 On May 13, 2005, Petitioner filed a sixth Petition for Writ of Habeas Corpus (Post-
18 Conviction) ("Sixth Petition"). On June 5, 2005, the State filed its Response. On July 5,
19 2005, the District Court dismissed Petitioner's Sixth Petition. Findings of Fact, Conclusions
20 of Law, and Order reflecting the same were filed on July 25, 2005. Petitioner appealed the
21 denial of his Sixth Petition on August 9, 2005. The Nevada Supreme Court affirmed the
22 Court's denial of Petitioner's Sixth Petition on November 15, 2005. Remittitur issued on
23 December 13, 2005.

24 On July 7, 2011, Petitioner filed a seventh Petition for Writ of Habeas Corpus (Post-
25 Conviction) ("Seventh Petition"). On October 21, 2011, the State filed a Motion to Dismiss.
26 On October 25, 2011, the District Court granted the State's Motion to Dismiss and ordered
27 the clerk of the court to transfer the Petition to the Seventh Judicial District.
28

1 On June 14, 2013, Petitioner filed an eighth Petition for Writ of Habeas Corpus (Post-
2 Conviction) (“Eighth Petition”). On July 10, 2013, the District Court denied Petitioner’s
3 Eighth Petition. Petitioner appealed the Court’s denial of his Eighth Petition on July 22,
4 2013. On February 20, 2014, the Nevada Supreme Court affirmed the Court’s denial of
5 Petitioner’s Eighth Petition. Remittitur issued on February 20, 2014.

6 On September 7, 2016, Petitioner filed a ninth Petition for Writ of Habeas Corpus
7 (Post-Conviction) (“Ninth Petition”). On October 25, 2016, the District Court denied
8 Petitioner’s Ninth Petition. Findings of Fact, Conclusions of Law, and Order reflecting the
9 same were filed on October 31, 2016. Petitioner appealed the denial of his Ninth Petition on
10 November 9, 2016. On July 12, 2017, the Nevada Supreme Court reversed and remanded the
11 District Court’s denial and ordered that Petitioner’s Ninth Petition be sent to the Seventh
12 Judicial District. Remittitur issued on December August 14, 2017.

13 On November 29, 2017, the Seventh Judicial District entered an order recommending
14 that Petitioner’s Judgment of Conviction be amended. On March 2, 2018 an Amended
15 Judgment of Conviction was filed. Petitioner’s sentence was amended to reflect the
16 following correction: Count 3 to run concurrently to Count 2; and Count 4 to run consecutive
17 to Count 3. On June 14, 2018, Petitioner appealed the Amended Judgment of Conviction and
18 filed a Writ of Mandamus seeking the Nevada Supreme Court to direct the Nevada
19 Department of Corrections to accurately calculate his sentence. The Nevada Court of
20 Appeals dismissed the appeal on January 17, 2019.

21 On February 1, 2019, Petitioner filed his tenth Petition for Writ of Habeas Corpus
22 Pursuant to NRS 34.500(2); (9) (“Tenth Petition”). On February 7, 2019 Petitioner filed a
23 Motion to Amend the Petition for Writ of Habeas Corpus and supplemented his argument.
24 On April 18, 2019, the District Court denied Petitioner’s Tenth Petition. Findings of Fact,
25 Conclusions of Law, and Order reflecting the same were filed on April 22, 2019. On May 20,
26 2019, Petitioner appealed the denial of his Tenth Petition. On January 14, 2020, the Nevada
27 Supreme Court Affirmed the Court’s denial. Remittitur issued February 25, 2020.

28

1 On August 5, 2019, Petitioner filed his eleventh Petition for Writ of Habeas Corpus
2 Pursuant to NRS 34.500(2); (9) (“Eleventh Petition”). On October 10, 2019, the State filed
3 its response. On October 16, 2019, the District Court denied Petitioner’s Eleventh Petition.

4 On February 6, 2020, Petitioner filed the instant and twelfth Petition for Writ of
5 Habeas Corpus (Post-Conviction) (“Twelfth Petition”). On March 18, the District Court
6 ordered “the State to respond to the Petition for the limited purpose of determining whether
7 the instant petition is procedurally time barred.” On April 10, 2020 the State filed a Response
8 to Petitioner’s Twelfth Petition. On May 19, 2020 this Court reviewed the pleadings and
9 issued a Minute Order denying Petitioner Twelfth Petition.

10 ANALYSIS

11 **I. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS IS** 12 **PROCEDURALLY TIME BARRED PURUSANT TO NRS 34.726**

13 A petitioner must raise all grounds for relief in a timely filed first post-conviction
14 Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523
15 (2001). A petitioner must challenge the validity of their judgment or sentence within one
16 year from the entry of judgment of conviction or after the Supreme Court issues remittitur
17 pursuant to NRS 34.726(1). NRS 34.726(1). This one-year time limit is strictly applied and
18 begins to run from the date the judgment of conviction is filed or remittitur issues from a
19 timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528
20 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

21 The Nevada Supreme Court has explained that:

22 [C]onstruing NRS 34.726 to provide such an extended time period would
23 result in an absurdity that the Legislature could not have intended. A
24 judgment of conviction may be amended at any time to correct a clerical
25 error or to correct an illegal sentence. Because the district court may
26 amend the judgment many years, even decades, after the entry of the
27 original judgment of conviction, restarting the one-year time period for all
28 purposes every time an amendment occurs would frustrate the purpose
and spirit of NRS 34.726. Specifically, it would undermine the doctrine of
finality of judgments by allowing petitioners to file post-conviction
habeas petitions in perpetuity.

1 Id.

2 This timeline does not change if an Amended Judgment of Conviction is filed.
3 Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). The Nevada Supreme Court
4 has explained that when claims raised in a Petition for Writ of Habeas Corpus challenge the
5 initial conviction, direct appeal, or could have been raised before the judgment of conviction
6 was amended, the clock to raise those claims begins to run when the original judgment of
7 conviction is filed or remittitur issues. Id. at 541, 96 P.3d at 765.

8 “Application of the statutory procedural default rules to post-conviction habeas
9 petitions is mandatory,” and “cannot be ignored [by the district court] when properly raised
10 by the State.” State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112
11 P.3d 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court
12 rejected a habeas petition filed two days late despite evidence presented by the defendant that
13 he purchased postage through the prison and mailed the Notice within the one-year time
14 limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). Absent a showing of good cause, district
15 courts have a duty to consider whether claims raised in a petition are procedurally barred,
16 and have no discretion regarding whether to apply the statutory procedural bars. Riker, 121
17 Nev. at 233, 112 P.3d at 1075.

18 Here, the Petitioner’s first Judgment of Conviction was filed on July 29, 1981, and
19 Remittitur issued on May 10, 1983. Petitioner’s Amended Judgment of Conviction was filed
20 on June 14, 2018, amending Count 3 to run concurrently to Count 2, and Count 4 to run
21 consecutively to Count 3. Petitioner’s appeal challenging the Amended Judgment of
22 Conviction was dismissed on January 17, 2019.

23 In this Twelfth Petition, Petitioner alleges he was denied his Sixth Amendment Right
24 to Autonomy and Effective Counsel. Twelfth Petition at 5. As the Twelfth Petition does not
25 challenge any change made in the Amended Judgment of Conviction, the clock to raise this
26 claim began to run on May 10, 1983, when Remittitur issued on his direct appeal. The instant
27 petition was filed 36 years past the one-year deadline. As such, absent a showing of good
28 cause and prejudice, the Twelfth Petition must be denied as procedurally time barred.

///

1 **II. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS IS BARRED**
2 **AS SUCCESSIVE**

3 Courts must dismiss successive post-conviction petitions if a prior petition was
4 decided on the merits and a petitioner fails to raise new grounds for relief, or if a petitioner
5 does raise new grounds for relief but failure to assert those grounds in any prior petition was
6 an abuse of the writ. NRS 34.810(2); See State v. District Court (Riker), 121 Nev. 225, 231,
7 112 P.3d 1070, 1074 (2005). In other words, if the claim or allegation was previously
8 available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later
9 petition. McClesky v. Zant, 499 U.S. 467, 497-98, 111 S.Ct. 1454, 1472 (1991). “Successive
10 petitions may be dismissed based solely on the face of the petition.” Ford v. Warden, 111
11 Nev. 872, 882, 901 P.2d 123, 129 (1995). Successive petitions will only be decided on the
12 merits if the petitioner can show good cause and prejudice for failing to raise the new
13 grounds in their first petition. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d
14 944, 950 (1994).

15 Petitioner is claiming that he is entitled to relief pursuant to the US Supreme Court’s
16 decision in McCoy v. Louisiana, 138 S. Ct. 1500, 200 L.Ed 2d 821 (2018), because counsel
17 allegedly conceded guilt over his objection at trial. Twelfth Petition at 9-14. However,
18 Petitioner claimed counsel was ineffective for conceding his guilt in his Fourth, Sixth, and
19 Tenth Petitions, all of which were properly denied by this Court. Petitioner is abusing the
20 writ by continuing to raise a claim already denying by this court and this Court may only
21 consider the merits of Petitioner’s claim if he can establish good cause and prejudice. NRS
22 38.810(3).

23 **III. PETITIONER HAS NOT ESTABLISHED GOOD CAUSE**

24 To avoid procedural default, under NRS 34.726, a petitioner has the burden of
25 pleading and proving specific facts that demonstrate good cause for his failure to present his
26 claim in earlier proceedings or comply with the statutory requirements, and that he will be
27 unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109
28 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104

1 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court must dismiss a habeas petition if it
2 presents claims that either were or could have been presented in an earlier proceeding, unless
3 the court finds both cause for failing to present the claims earlier or for raising them again
4 and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498,
5 523 (2001).

6 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate
7 the following: (1) “[t]hat the delay is not the fault of the petitioner” and (2) that the petitioner
8 will be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726. To meet
9 the first requirement, “a petitioner must show that an impediment external to the defense
10 prevented him or her from complying with the state procedural default rules.” Hathaway v.
11 State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). “A qualifying impediment might be
12 shown where the factual or legal basis for a claim was not reasonably available at the time of
13 default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). However, “appellants
14 cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526. To find good cause
15 there must be a “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119
16 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773
17 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and
18 the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv.
19 Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be
20 the fault of the petitioner. NRS 34.726(1)(a).

21 A petitioner raising good cause to excuse procedural bars must do so within a
22 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34
23 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
24 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably
25 available to the petitioner during the statutory time period did not constitute good cause to
26 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
27 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S.
28 446, 453 120 S. Ct. 1587, 1592 (2000).

1 Petitioner claims he has good cause for two reasons: 1) McCoy v. Louisiana, 138 S.
2 Ct. 1500 (2018), announced a new applicable and retroactive constitutional rule; 2) the
3 prison prevented his access to the courts in violation of Bounds v. Smith, 430 U.S. 817, 821,
4 97. S.Ct. 1491, 1494 (1997) (abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174
5 (1996). Twelfth Petition at 12-14. Neither claim amounts to good cause.

6 **A. McCoy does not provide good cause to overcome the procedural bars.**

7 Petitioner claims the McCoy decision, which was issued over three decades after
8 Petitioner’s Judgment of Conviction was affirmed, applies retroactively to his case and
9 establishes that his counsel committed structural error when he conceded Petitioner’s guilt to
10 sexual assault without his consent. Twelfth Petition at 12. However, McCoy is not a proper
11 basis for good cause because it does not apply to post-conviction habeas proceedings, does
12 not stand for the proposition Petitioner claims it does, is not retroactive, and was not a new
13 rule.

14 First, McCoy was decided on direct appeal, and the Court explicitly stated that it was
15 not analyzing the claim under a Strickland analysis. McCoy, 138 S.Ct. at 1511. As such, it is
16 improper to raise a McCoy claim in a Petition for Writ of Habeas Corpus as habeas petitions
17 are limited to effective assistance of counsel and voluntariness of pleas. Franklin v. State,
18 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

19 Second, McCoy does not require counsel to obtain their client’s consent before
20 conceding their guilt, as Petitioner claims. Twelfth Petition at 12. Instead, McCoy held that
21 “it is unconstitutional to allow defense counsel to concede guilt over the defendant’s
22 *intransigent and unambiguous objection*” and that such an error is structural. 138 S.Ct. at
23 1511. (emphasis added). A review of the law leading up to McCoy further dispels
24 Petitioner’s claim. Fifteen years ago, the US Supreme Court held that no “blanket rule
25 demand[s] the defendant’s explicit consent” to the strategic concession of guilt. Florida v.
26 Nixon, 543 U.S. 175, 192 (2004). Instead, the Court held that when counsel informs the
27 defendant of the strategy and the defendant thereafter neither approves nor protests the
28 strategy, the strategy may be implemented. Id. at 181. Almost a decade later, the Nevada

1 Supreme Court analyzed Nixon and explicitly adopted its rationale. Armenta-Carpio v. State,
2 129 Nev. 531, 306 P.3d 395 (2013). The Court noted that Nixon had “expressly rejected”
3 framing the concession of guilt as the functional equivalent of a guilty plea. Id. (citing
4 Nixon, 543 U.S. at 188, 125 S.Ct. at 561). As such, unless the defendant vociferously and
5 unambiguously objects to counsel admitting guilt, it is Nixon, and not McCoy, that governs.
6 The rule announced in McCoy did not create any new rights except when a defendant does
7 object in such a manner. While it appears that Petitioner testified in his defense, Petitioner
8 does not allege that he objected to counsel’s argument. Therefore, McCoy would not even
9 apply to Petitioner’s claim.

10 Third, McCoy is not retroactive and neither the US Supreme Court nor the Nevada
11 Supreme Court has held as much. With narrow exception, “new constitutional rules of
12 criminal procedure will not be applicable to those cases which have become final before the
13 new rules are announced.” Teague v. Lane, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989).
14 In Colwell v. State, the Nevada Supreme Court delineated a three-step analysis to determine
15 retroactivity: 1) determine if a holding established a new constitutional rule; 2) if a rule is
16 new but not constitutional, it does not apply retroactively; and 3) if the rule is not new, then
17 it applies to finalized cases on collateral review and retroactivity is not at issue. 118 Nev.
18 807, 819-22, 59 P.3d 463, 471-73 (2002). New constitutional rules will apply in cases in
19 which there is a final judgment only if: 1) The rule establishes that it is unconstitutional to
20 proscribe certain conduct or impose certain punishment based on the class of offender or the
21 status of the offense; or 2) The rule establishes a procedure “without which the likelihood of
22 an accurate conviction is seriously diminished.” Id. at 820, 59 P.3d at 472.

23 While McCoy was a new constitutional rule, as Petitioner’s conviction was final at the
24 time McCoy was announced, unless one of the exceptions provided for in Colwell applies, it
25 is not retroactive. McCoy does not fit under either exception. It did not establish that it is
26 unconstitutional to proscribe certain conduct or impose certain punishments based on the
27 class of offender; and it does not impose a new procedural rule designed to improve the
28 accuracy of criminal convictions. McCoy demands that defendants assert the right clearly

1 and straightforwardly before it can be applied and does not alter procedure. McCoy, 138 S.Ct
2 at 1507. Next, McCoy was based more on the Sixth amendment right to a jury trial, rather
3 than concern about the relative accuracy of judicial vs. jury findings. Therefore, as
4 Petitioner’s conviction was final when McCoy was decided, and McCoy does not fall under
5 either of the exceptions articulated in Colwell, it is not retroactive and cannot amount to
6 good cause.

7 Fourth, McCoy is not new law in Nevada. Two decades prior to McCoy, the Nevada
8 Supreme Court held that if counsel undermines the “client’s testimonial disavowal of guilt
9 during the guilt phase of the trial,” counsel is ineffective. Jones v. State, 110 Nev. 730, 739,
10 877 P.2d 1052, 1057 (1994). This is precisely the rule announced in McCoy. In fact, the
11 McCoy Court explained that many state supreme courts had already held as the Nevada
12 Supreme Court held in Jones: that counsel may not admit guilt when the defendant
13 “vociferous[ly] and repeated[ly] protest[s].” Id. Accordingly, McCoy provides nothing that
14 was not already available under Nevada law. Any claim based on Petitioner’s alleged
15 objection to conceding guilt has been available to him under Jones since 1994. Petitioner
16 cannot now claim that he has good cause to raise this claim which has therefore been
17 available to him for 25 years.

18 As McCoy is inapplicable to Petitioner’s claim, it cannot be the basis for good cause
19 for delay in raising this claim. The Court dismisses Petitioner’s Twelfth Petition as untimely.

20 **B. Petitioner was not denied access to the courts.**

21 Next, Petitioner claims that he has good cause because he raised this claim in a prior
22 petition which was denied for an incorrect filing. Twelfth Petition at 2-9. Petitioner explains
23 that he did so because he did not have access to the prison law library which consisted of a
24 paging system, and he therefore did not know how to correctly file a Petition. Id. at 13.
25 Petitioner claims this restricted his access to the courts in violation of Bounds v. Smith, 430
26 U.S. 817, 821, 97. S.Ct. 1491, 1494 (1977) Petitioner filed his Tenth Petition pursuant to
27 NRS 34.360 through NRS 34.680 which this Court denied as procedurally barred. The
28 Nevada Court of Appeals affirmed that dismissal because it reached the correct result for the

1 wrong reason pursuant to Wyatt v. State, 86 Nev. 249, 298, 468 P.2d 338, 341 (190). Order
2 of Affirmance at 1. Specifically, the Court explained that while this Court should not have
3 dismissed the Tenth Petition as a procedurally barred Petition for Writ of Habeas Corpus,
4 dismissal was nevertheless correct because his claim was not properly raised. Id. at 2. When
5 the Court did so, it directed Petitioner to raise his claims in a correctly filed Petition for Writ
6 of Habeas Corpus, but expressly chose not to address whether his claims was procedurally
7 barred. Id. at 2, fn. 1. Petitioner then filed this Twelfth Petition.

8 First, Petitioner's understanding of Bounds is incorrect. Bounds holds that prisons
9 cannot restrict an inmate's access to the courts by denying materials needed to write habeas
10 petitions or appeals, or by requiring inmates pay docket fees to file those documents. Id. at
11 822-23., 97. S.Ct. 1495. That is not what happened here. Petitioner makes no allegation that
12 the prison prevented him from filing this or any petition. Indeed, he cannot as this is
13 Petitioner's twelfth petition and he has filed appeals challenging the denial of eight out of ten
14 of his prior petitions. It is therefore clear that the prison is not preventing him from filing
15 anything. As such, Bounds cannot establish good cause for Petitioner.

16 Moreover, Bounds was abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174
17 (1996)). In Lewis, the US Supreme Court specifically held that "Bounds did not create an
18 abstract, freestanding right to a law library or legal assistance, an inmate cannot establish
19 relevant actual injury simply by establishing that his prison's law library or legal assistance
20 program is subpar in some theoretical sense." Id. Instead, a petitioner must show that
21 deficiencies in the prison's legal assistance facilities resulted in a dismissal of a complaint for
22 failure to satisfy some technical requirement. Id. As such, Petitioner's dissatisfaction with
23 the prison law library does not provide good cause to overcome the procedural bar.

24 Petitioner cannot claim that Lewis applies because his Tenth Petition was not rejected
25 on a technicality. Instead the Court concluded that his claims were not properly raised in the
26 pleading filed. Order of Affirmance at 2. While Petitioner asserts that his lack of legal
27 knowledge prevented him from knowing that he had to file a Petition for Writ of Habeas
28 Corpus, that claim is belied by the fact that it was the Tenth Petition for Writ of Habeas

1 Corpus he filed. As such, it is clear that Petitioner knew the proper procedure for challenging
2 his Judgment of Conviction was through a Petition for Writ of Habeas Corpus. He cannot
3 now claim ignorance of that process.

4 Therefore, Petitioner has failed to establish good cause for delay. Petitioner is alleging
5 no new information he just gained access to that would make it reasonable to wait nearly
6 four decades to challenge his counsel's ineffectiveness. As such, the Court dismisses
7 Petitioner's Twelfth Petition.

8 **IV. PETITIONER HAS NOT ESTABLISHED PREJUDICE.**

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

14 Petitioner claims he can demonstrate actual prejudice pursuant McCoy. Twelfth
15 Petition at 14. Petitioner explains that McCoy precluded his counsel from conceding his guilt
16 to one of the sexual assaults and that counsel doing so amounts to structural error. Id. at 9-11.

17 Petitioner's claim is belied by the record. Counsel never conceded his guilt.
18 Petitioner's provided excerpts of the closing argument establish that after counsel finished
19 arguing that there was not enough evidence of Petitioner's guilt of Counts 1 or 2, he
20 explained that if he ended his argument then, all the jury could find him guilty of was sexual
21 assault. Recorder's Transcript of Hearing, Jury Trial: Friday May 1, 1981, Monday May 4,
22 1981, at 476. Counsel then proceeded to argue that there was no proof beyond a reasonable
23 doubt that he was guilty of sexual assault. Id. at 476-82. Counsel referenced Petitioner's
24 testimony, attacked the victim's credibility, and argued how Petitioner's actions were not
25 that of someone who committed a crime. Id. 482-83; 486-87. Finally, counsel concluded his
26 arguments by stating that “every act done in this case is consistent with innocence,” and
27 asked the jury to return a verdict of “Not Guilty.” Id. 478.

28

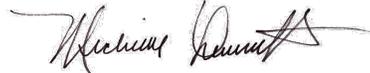
1 At no point did counsel tell the jury Petitioner was guilty of sexual assault. Therefore,
2 Petitioner's claim is belied by the record and this Court dismisses his Twelfth Petition as
3 procedurally time barred with no good cause or prejudice shown.

4 **ORDER**

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

7 DATED this _____ day of September, 2021.

Dated this 13th day of September, 2021



9 **DISTRICT JUDGE**

**208 B58 F5EF F39A
Michelle Leavitt
District Court Judge**

10 STEVEN B. WOLFSON
11 Clark County District Attorney
Nevada Bar #001565

12 BY



13 **ALEXANDER CHEN**
14 Chief Deputy District Attorney
Nevada Bar #10539

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joel Burkett, Plaintiff(s)

CASE NO: A-19-788633-W

7 vs.

DEPT. NO. Department 12

8 William A Gittere, 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 Findings of Fact, Conclusions of Law and Order was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

14 Service Date: 9/13/2021

15 Eileen Davis

eileen.davis@clarkcountynv.com

16 Alexander Chen

Alexander.chen@clarkcountynv.com

17
18 If indicated below, a copy of the above mentioned filings were also served by mail
19 via United States Postal Service, postage prepaid, to the parties listed below at their last
known addresses on 9/14/2021

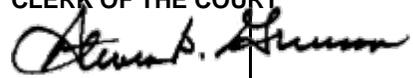
20 Joel Burkett

ESP
P.O. Box 1989
Ely, NV, 89301

21
22
23 Steven Wolfson

Juvenile Division - District Attorney's Office
601 N Pecos Road
Las Vegas, NV, 89101

24
25
26
27
28



1 NEFF

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

4
5 JOEL BURKETT,

6 Petitioner,

Case No: A-19-788633-W

Dept No: XII

7 vs.

8 WILLIAM A. GITTERE,

9 Respondent,

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

10
11 **PLEASE TAKE NOTICE** that on September 13, 2021, the court entered a decision or order in this matter,
12 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
15 to you. This notice was mailed on September 16, 2021.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

17
18
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 16 day of September 2021, I served a copy of this Notice of Entry on the
21 following:

22 By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

23
24 The United States mail addressed as follows:
25 Joel Burkett # 16111
26 P.O. Box 7000
Carson City, NV 89702

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

1 **FCL**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 ALEXANDER CHEN
6 Chief Deputy District Attorney
7 Nevada Bar #10539
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,
11 -vs-
12 JOEL BURKETT, aka,
13 Raymond Haire, #609533
14 Defendant.

CASE NO: A-19-788633-W
DEPT NO: XII
(Twelfth Petition)

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

DATE OF HEARING: MAY 19, 2020
TIME OF HEARING: 8:00 AM

18 THIS CAUSE having come on for hearing before the Honorable MICHELLE
19 LEAVITT, District Judge, on the 19 day of MAY, 2020, the Petitioner not being present,
20 proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON,
21 Clark County District Attorney, by and through ALEXANDER CHEN, Chief Deputy
22 District Attorney, and the Court having considered the matter, including briefs, transcripts, ,
23 and documents on file herein, now therefore, the Court makes the following findings of fact
24 and conclusions of law:

25 ///
26 ///
27 ///
28 ///

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

2 **PROCDURAL HISTORY**

3 On January 19, 1981, Joel Burkett (“Petitioner”) was charged with Count 1 – Robbery
4 and Use of a Deadly Weapon in Commission of a Crime (Felony – NRS 200.380, 193.165);
5 Count 2 – First-Degree Kidnapping and Use of Deadly Weapon in Commission of a Crime
6 (Felony – NRS 200.310, 193.165); and Counts 3 and 4 – Sexual Assault (Felony – NRS
7 200.364, 200.366).

8 On May 4, 1981, a jury found Petitioner guilty of all counts.

9 On June 2, 1981, Petitioner was sentenced as follows: Count 1 – 15 years for the
10 Robbery, plus a consecutive 15 years for the Deadly Weapon in Commission of a Crime;
11 Count 2 – life with the possibility of parole, plus a consecutive term of life with the
12 possibility of parole for the Deadly Weapon in Commission of a Crime, to be served
13 consecutive to Count 1; Count 3 – life with the possibility of parole, concurrent to Counts 1
14 and 2; and Count 4 – life with the possibility of parole, concurrent to Counts 1 and 2. The
15 Judgment of Conviction reflecting the same was filed on July 29, 1981.

16 On June 19, 1981, Petitioner appealed the Judgment of Conviction. On April 21,
17 1983, the Nevada Supreme Court dismissed the appeal. Remittitur issued on May 10, 1983.

18 On February 2, 1994, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
19 Conviction) (“First Petition”). On February 28, 1994, the District Court granted in part and
20 denied in part Petitioner’s First Petition.

21 On June 7, 1999, Petitioner filed a second Petition for Writ of Habeas Corpus (Post-
22 Conviction) (“Second Petition”). The State filed its Response on August 4, 1999. On August
23 12, 1999, the District Court denied Petitioner’s Second Petition. On August 18, 1999,
24 Findings of Fact, Conclusions of Law, and Order reflecting the same was filed. Petitioner
25 appealed the denial of his Second Petition on August 31, 1999. The Nevada Supreme Court
26 affirmed the Court’s denial on July 10, 2001. Remittitur issued on August 7, 2001.

27 On November 19, 2001, Petitioner filed a third Petition for Writ of Habeas Corpus
28 (Post-Conviction) (“Third Petition”). On January 23, 2002, the State filed its Response. The

1 District Court denied Petitioner's Third Petition on January 24, 2002. Findings of Fact,
2 Conclusions of Law, and Order reflecting the same was filed on February 14, 2002.
3 Petitioner appealed the Court's denial of his Third Petition on March 20, 2002. On February
4 6, 2003, the Nevada Supreme Court reversed the judgment of the District Court and
5 remanded the matter. Remittitur issued on March 4, 2003.

6 On February 19, 2003, Petitioner filed a fourth Petition for Writ of Habeas Corpus
7 (Post-Conviction) ("Fourth Petition"). On April 3, 2003, the Attorney General filed its
8 Response. On May 1, 2003, the District Court denied Petitioner's Third and Fourth Petitions.
9 Findings of Fact, Conclusions of Law, and Order reflecting the same were filed on May 14,
10 2003, and May 15, 2003 respectively. Petitioner appealed the denial of his Third and Fourth
11 Petitions on May 7, 2003. The Nevada Supreme Court affirmed the Court's denial of
12 Petitioner's Fourth Petition on March 5, 2004. Remittitur issued on March 30, 2004.

13 On September 1, 2004, Petitioner filed a fifth Petition for Writ of Habeas Corpus
14 (Post-Conviction) ("Fifth Petition"). On October 12, 2004, the State filed its Response. On
15 October 19, 2004, the District Court denied Petitioner's Fifth Petition. Findings of Fact,
16 Conclusions of Law, and Order reflecting the same were filed on November 1, 2004.

17 On May 13, 2005, Petitioner filed a sixth Petition for Writ of Habeas Corpus (Post-
18 Conviction) ("Sixth Petition"). On June 5, 2005, the State filed its Response. On July 5,
19 2005, the District Court dismissed Petitioner's Sixth Petition. Findings of Fact, Conclusions
20 of Law, and Order reflecting the same were filed on July 25, 2005. Petitioner appealed the
21 denial of his Sixth Petition on August 9, 2005. The Nevada Supreme Court affirmed the
22 Court's denial of Petitioner's Sixth Petition on November 15, 2005. Remittitur issued on
23 December 13, 2005.

24 On July 7, 2011, Petitioner filed a seventh Petition for Writ of Habeas Corpus (Post-
25 Conviction) ("Seventh Petition"). On October 21, 2011, the State filed a Motion to Dismiss.
26 On October 25, 2011, the District Court granted the State's Motion to Dismiss and ordered
27 the clerk of the court to transfer the Petition to the Seventh Judicial District.
28

1 On June 14, 2013, Petitioner filed an eighth Petition for Writ of Habeas Corpus (Post-
2 Conviction) (“Eighth Petition”). On July 10, 2013, the District Court denied Petitioner’s
3 Eighth Petition. Petitioner appealed the Court’s denial of his Eighth Petition on July 22,
4 2013. On February 20, 2014, the Nevada Supreme Court affirmed the Court’s denial of
5 Petitioner’s Eighth Petition. Remittitur issued on February 20, 2014.

6 On September 7, 2016, Petitioner filed a ninth Petition for Writ of Habeas Corpus
7 (Post-Conviction) (“Ninth Petition”). On October 25, 2016, the District Court denied
8 Petitioner’s Ninth Petition. Findings of Fact, Conclusions of Law, and Order reflecting the
9 same were filed on October 31, 2016. Petitioner appealed the denial of his Ninth Petition on
10 November 9, 2016. On July 12, 2017, the Nevada Supreme Court reversed and remanded the
11 District Court’s denial and ordered that Petitioner’s Ninth Petition be sent to the Seventh
12 Judicial District. Remittitur issued on December August 14, 2017.

13 On November 29, 2017, the Seventh Judicial District entered an order recommending
14 that Petitioner’s Judgment of Conviction be amended. On March 2, 2018 an Amended
15 Judgment of Conviction was filed. Petitioner’s sentence was amended to reflect the
16 following correction: Count 3 to run concurrently to Count 2; and Count 4 to run consecutive
17 to Count 3. On June 14, 2018, Petitioner appealed the Amended Judgment of Conviction and
18 filed a Writ of Mandamus seeking the Nevada Supreme Court to direct the Nevada
19 Department of Corrections to accurately calculate his sentence. The Nevada Court of
20 Appeals dismissed the appeal on January 17, 2019.

21 On February 1, 2019, Petitioner filed his tenth Petition for Writ of Habeas Corpus
22 Pursuant to NRS 34.500(2); (9) (“Tenth Petition”). On February 7, 2019 Petitioner filed a
23 Motion to Amend the Petition for Writ of Habeas Corpus and supplemented his argument.
24 On April 18, 2019, the District Court denied Petitioner’s Tenth Petition. Findings of Fact,
25 Conclusions of Law, and Order reflecting the same were filed on April 22, 2019. On May 20,
26 2019, Petitioner appealed the denial of his Tenth Petition. On January 14, 2020, the Nevada
27 Supreme Court Affirmed the Court’s denial. Remittitur issued February 25, 2020.

28

1 On August 5, 2019, Petitioner filed his eleventh Petition for Writ of Habeas Corpus
2 Pursuant to NRS 34.500(2); (9) (“Eleventh Petition”). On October 10, 2019, the State filed
3 its response. On October 16, 2019, the District Court denied Petitioner’s Eleventh Petition.

4 On February 6, 2020, Petitioner filed the instant and twelfth Petition for Writ of
5 Habeas Corpus (Post-Conviction) (“Twelfth Petition”). On March 18, the District Court
6 ordered “the State to respond to the Petition for the limited purpose of determining whether
7 the instant petition is procedurally time barred.” On April 10, 2020 the State filed a Response
8 to Petitioner’s Twelfth Petition. On May 19, 2020 this Court reviewed the pleadings and
9 issued a Minute Order denying Petitioner Twelfth Petition.

10 ANALYSIS

11 **I. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS IS** 12 **PROCEDURALLY TIME BARRED PURUSANT TO NRS 34.726**

13 A petitioner must raise all grounds for relief in a timely filed first post-conviction
14 Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523
15 (2001). A petitioner must challenge the validity of their judgment or sentence within one
16 year from the entry of judgment of conviction or after the Supreme Court issues remittitur
17 pursuant to NRS 34.726(1). NRS 34.726(1). This one-year time limit is strictly applied and
18 begins to run from the date the judgment of conviction is filed or remittitur issues from a
19 timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528
20 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

21 The Nevada Supreme Court has explained that:

22 [C]onstruing NRS 34.726 to provide such an extended time period would
23 result in an absurdity that the Legislature could not have intended. A
24 judgment of conviction may be amended at any time to correct a clerical
25 error or to correct an illegal sentence. Because the district court may
26 amend the judgment many years, even decades, after the entry of the
27 original judgment of conviction, restarting the one-year time period for all
28 purposes every time an amendment occurs would frustrate the purpose
and spirit of NRS 34.726. Specifically, it would undermine the doctrine of
finality of judgments by allowing petitioners to file post-conviction
habeas petitions in perpetuity.

1 Id.

2 This timeline does not change if an Amended Judgment of Conviction is filed.
3 Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). The Nevada Supreme Court
4 has explained that when claims raised in a Petition for Writ of Habeas Corpus challenge the
5 initial conviction, direct appeal, or could have been raised before the judgment of conviction
6 was amended, the clock to raise those claims begins to run when the original judgment of
7 conviction is filed or remittitur issues. Id. at 541, 96 P.3d at 765.

8 “Application of the statutory procedural default rules to post-conviction habeas
9 petitions is mandatory,” and “cannot be ignored [by the district court] when properly raised
10 by the State.” State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112
11 P.3d 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court
12 rejected a habeas petition filed two days late despite evidence presented by the defendant that
13 he purchased postage through the prison and mailed the Notice within the one-year time
14 limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). Absent a showing of good cause, district
15 courts have a duty to consider whether claims raised in a petition are procedurally barred,
16 and have no discretion regarding whether to apply the statutory procedural bars. Riker, 121
17 Nev. at 233, 112 P.3d at 1075.

18 Here, the Petitioner’s first Judgment of Conviction was filed on July 29, 1981, and
19 Remittitur issued on May 10, 1983. Petitioner’s Amended Judgment of Conviction was filed
20 on June 14, 2018, amending Count 3 to run concurrently to Count 2, and Count 4 to run
21 consecutively to Count 3. Petitioner’s appeal challenging the Amended Judgment of
22 Conviction was dismissed on January 17, 2019.

23 In this Twelfth Petition, Petitioner alleges he was denied his Sixth Amendment Right
24 to Autonomy and Effective Counsel. Twelfth Petition at 5. As the Twelfth Petition does not
25 challenge any change made in the Amended Judgment of Conviction, the clock to raise this
26 claim began to run on May 10, 1983, when Remittitur issued on his direct appeal. The instant
27 petition was filed 36 years past the one-year deadline. As such, absent a showing of good
28 cause and prejudice, the Twelfth Petition must be denied as procedurally time barred.

///

1 **II. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS IS BARRED**
2 **AS SUCCESSIVE**

3 Courts must dismiss successive post-conviction petitions if a prior petition was
4 decided on the merits and a petitioner fails to raise new grounds for relief, or if a petitioner
5 does raise new grounds for relief but failure to assert those grounds in any prior petition was
6 an abuse of the writ. NRS 34.810(2); See State v. District Court (Riker), 121 Nev. 225, 231,
7 112 P.3d 1070, 1074 (2005). In other words, if the claim or allegation was previously
8 available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later
9 petition. McClesky v. Zant, 499 U.S. 467, 497-98, 111 S.Ct. 1454, 1472 (1991). “Successive
10 petitions may be dismissed based solely on the face of the petition.” Ford v. Warden, 111
11 Nev. 872, 882, 901 P.2d 123, 129 (1995). Successive petitions will only be decided on the
12 merits if the petitioner can show good cause and prejudice for failing to raise the new
13 grounds in their first petition. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d
14 944, 950 (1994).

15 Petitioner is claiming that he is entitled to relief pursuant to the US Supreme Court’s
16 decision in McCoy v. Louisiana, 138 S. Ct. 1500, 200 L.Ed 2d 821 (2018), because counsel
17 allegedly conceded guilt over his objection at trial. Twelfth Petition at 9-14. However,
18 Petitioner claimed counsel was ineffective for conceding his guilt in his Fourth, Sixth, and
19 Tenth Petitions, all of which were properly denied by this Court. Petitioner is abusing the
20 writ by continuing to raise a claim already denying by this court and this Court may only
21 consider the merits of Petitioner’s claim if he can establish good cause and prejudice. NRS
22 38.810(3).

23 **III. PETITIONER HAS NOT ESTABLISHED GOOD CAUSE**

24 To avoid procedural default, under NRS 34.726, a petitioner has the burden of
25 pleading and proving specific facts that demonstrate good cause for his failure to present his
26 claim in earlier proceedings or comply with the statutory requirements, and that he will be
27 unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109
28 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104

1 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court must dismiss a habeas petition if it
2 presents claims that either were or could have been presented in an earlier proceeding, unless
3 the court finds both cause for failing to present the claims earlier or for raising them again
4 and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498,
5 523 (2001).

6 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate
7 the following: (1) “[t]hat the delay is not the fault of the petitioner” and (2) that the petitioner
8 will be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726. To meet
9 the first requirement, “a petitioner must show that an impediment external to the defense
10 prevented him or her from complying with the state procedural default rules.” Hathaway v.
11 State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). “A qualifying impediment might be
12 shown where the factual or legal basis for a claim was not reasonably available at the time of
13 default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). However, “appellants
14 cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526. To find good cause
15 there must be a “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119
16 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773
17 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and
18 the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv.
19 Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be
20 the fault of the petitioner. NRS 34.726(1)(a).

21 A petitioner raising good cause to excuse procedural bars must do so within a
22 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34
23 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
24 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably
25 available to the petitioner during the statutory time period did not constitute good cause to
26 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
27 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S.
28 446, 453 120 S. Ct. 1587, 1592 (2000).

1 Petitioner claims he has good cause for two reasons: 1) McCoy v. Louisiana, 138 S.
2 Ct. 1500 (2018), announced a new applicable and retroactive constitutional rule; 2) the
3 prison prevented his access to the courts in violation of Bounds v. Smith, 430 U.S. 817, 821,
4 97. S.Ct. 1491, 1494 (1997) (abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174
5 (1996). Twelfth Petition at 12-14. Neither claim amounts to good cause.

6 **A. McCoy does not provide good cause to overcome the procedural bars.**

7 Petitioner claims the McCoy decision, which was issued over three decades after
8 Petitioner’s Judgment of Conviction was affirmed, applies retroactively to his case and
9 establishes that his counsel committed structural error when he conceded Petitioner’s guilt to
10 sexual assault without his consent. Twelfth Petition at 12. However, McCoy is not a proper
11 basis for good cause because it does not apply to post-conviction habeas proceedings, does
12 not stand for the proposition Petitioner claims it does, is not retroactive, and was not a new
13 rule.

14 First, McCoy was decided on direct appeal, and the Court explicitly stated that it was
15 not analyzing the claim under a Strickland analysis. McCoy, 138 S.Ct. at 1511. As such, it is
16 improper to raise a McCoy claim in a Petition for Writ of Habeas Corpus as habeas petitions
17 are limited to effective assistance of counsel and voluntariness of pleas. Franklin v. State,
18 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

19 Second, McCoy does not require counsel to obtain their client’s consent before
20 conceding their guilt, as Petitioner claims. Twelfth Petition at 12. Instead, McCoy held that
21 “it is unconstitutional to allow defense counsel to concede guilt over the defendant’s
22 *intransigent and unambiguous objection*” and that such an error is structural. 138 S.Ct. at
23 1511. (emphasis added). A review of the law leading up to McCoy further dispels
24 Petitioner’s claim. Fifteen years ago, the US Supreme Court held that no “blanket rule
25 demand[s] the defendant’s explicit consent” to the strategic concession of guilt. Florida v.
26 Nixon, 543 U.S. 175, 192 (2004). Instead, the Court held that when counsel informs the
27 defendant of the strategy and the defendant thereafter neither approves nor protests the
28 strategy, the strategy may be implemented. Id. at 181. Almost a decade later, the Nevada

1 Supreme Court analyzed Nixon and explicitly adopted its rationale. Armenta-Carpio v. State,
2 129 Nev. 531, 306 P.3d 395 (2013). The Court noted that Nixon had “expressly rejected”
3 framing the concession of guilt as the functional equivalent of a guilty plea. Id. (citing
4 Nixon, 543 U.S. at 188, 125 S.Ct. at 561). As such, unless the defendant vociferously and
5 unambiguously objects to counsel admitting guilt, it is Nixon, and not McCoy, that governs.
6 The rule announced in McCoy did not create any new rights except when a defendant does
7 object in such a manner. While it appears that Petitioner testified in his defense, Petitioner
8 does not allege that he objected to counsel’s argument. Therefore, McCoy would not even
9 apply to Petitioner’s claim.

10 Third, McCoy is not retroactive and neither the US Supreme Court nor the Nevada
11 Supreme Court has held as much. With narrow exception, “new constitutional rules of
12 criminal procedure will not be applicable to those cases which have become final before the
13 new rules are announced.” Teague v. Lane, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989).
14 In Colwell v. State, the Nevada Supreme Court delineated a three-step analysis to determine
15 retroactivity: 1) determine if a holding established a new constitutional rule; 2) if a rule is
16 new but not constitutional, it does not apply retroactively; and 3) if the rule is not new, then
17 it applies to finalized cases on collateral review and retroactivity is not at issue. 118 Nev.
18 807, 819-22, 59 P.3d 463, 471-73 (2002). New constitutional rules will apply in cases in
19 which there is a final judgment only if: 1) The rule establishes that it is unconstitutional to
20 proscribe certain conduct or impose certain punishment based on the class of offender or the
21 status of the offense; or 2) The rule establishes a procedure “without which the likelihood of
22 an accurate conviction is seriously diminished.” Id. at 820, 59 P.3d at 472.

23 While McCoy was a new constitutional rule, as Petitioner’s conviction was final at the
24 time McCoy was announced, unless one of the exceptions provided for in Colwell applies, it
25 is not retroactive. McCoy does not fit under either exception. It did not establish that it is
26 unconstitutional to proscribe certain conduct or impose certain punishments based on the
27 class of offender; and it does not impose a new procedural rule designed to improve the
28 accuracy of criminal convictions. McCoy demands that defendants assert the right clearly

1 and straightforwardly before it can be applied and does not alter procedure. McCoy, 138 S.Ct
2 at 1507. Next, McCoy was based more on the Sixth amendment right to a jury trial, rather
3 than concern about the relative accuracy of judicial vs. jury findings. Therefore, as
4 Petitioner’s conviction was final when McCoy was decided, and McCoy does not fall under
5 either of the exceptions articulated in Colwell, it is not retroactive and cannot amount to
6 good cause.

7 Fourth, McCoy is not new law in Nevada. Two decades prior to McCoy, the Nevada
8 Supreme Court held that if counsel undermines the “client’s testimonial disavowal of guilt
9 during the guilt phase of the trial,” counsel is ineffective. Jones v. State, 110 Nev. 730, 739,
10 877 P.2d 1052, 1057 (1994). This is precisely the rule announced in McCoy. In fact, the
11 McCoy Court explained that many state supreme courts had already held as the Nevada
12 Supreme Court held in Jones: that counsel may not admit guilt when the defendant
13 “vociferous[ly] and repeated[ly] protest[s].” Id. Accordingly, McCoy provides nothing that
14 was not already available under Nevada law. Any claim based on Petitioner’s alleged
15 objection to conceding guilt has been available to him under Jones since 1994. Petitioner
16 cannot now claim that he has good cause to raise this claim which has therefore been
17 available to him for 25 years.

18 As McCoy is inapplicable to Petitioner’s claim, it cannot be the basis for good cause
19 for delay in raising this claim. The Court dismisses Petitioner’s Twelfth Petition as untimely.

20 **B. Petitioner was not denied access to the courts.**

21 Next, Petitioner claims that he has good cause because he raised this claim in a prior
22 petition which was denied for an incorrect filing. Twelfth Petition at 2-9. Petitioner explains
23 that he did so because he did not have access to the prison law library which consisted of a
24 paging system, and he therefore did not know how to correctly file a Petition. Id. at 13.
25 Petitioner claims this restricted his access to the courts in violation of Bounds v. Smith, 430
26 U.S. 817, 821, 97. S.Ct. 1491, 1494 (1977) Petitioner filed his Tenth Petition pursuant to
27 NRS 34.360 through NRS 34.680 which this Court denied as procedurally barred. The
28 Nevada Court of Appeals affirmed that dismissal because it reached the correct result for the

1 wrong reason pursuant to Wyatt v. State, 86 Nev. 249, 298, 468 P.2d 338, 341 (190). Order
2 of Affirmance at 1. Specifically, the Court explained that while this Court should not have
3 dismissed the Tenth Petition as a procedurally barred Petition for Writ of Habeas Corpus,
4 dismissal was nevertheless correct because his claim was not properly raised. Id. at 2. When
5 the Court did so, it directed Petitioner to raise his claims in a correctly filed Petition for Writ
6 of Habeas Corpus, but expressly chose not to address whether his claims was procedurally
7 barred. Id. at 2, fn. 1. Petitioner then filed this Twelfth Petition.

8 First, Petitioner's understanding of Bounds is incorrect. Bounds holds that prisons
9 cannot restrict an inmate's access to the courts by denying materials needed to write habeas
10 petitions or appeals, or by requiring inmates pay docket fees to file those documents. Id. at
11 822-23., 97. S.Ct. 1495. That is not what happened here. Petitioner makes no allegation that
12 the prison prevented him from filing this or any petition. Indeed, he cannot as this is
13 Petitioner's twelfth petition and he has filed appeals challenging the denial of eight out of ten
14 of his prior petitions. It is therefore clear that the prison is not preventing him from filing
15 anything. As such, Bounds cannot establish good cause for Petitioner.

16 Moreover, Bounds was abrogated by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174
17 (1996)). In Lewis, the US Supreme Court specifically held that "Bounds did not create an
18 abstract, freestanding right to a law library or legal assistance, an inmate cannot establish
19 relevant actual injury simply by establishing that his prison's law library or legal assistance
20 program is subpar in some theoretical sense." Id. Instead, a petitioner must show that
21 deficiencies in the prison's legal assistance facilities resulted in a dismissal of a complaint for
22 failure to satisfy some technical requirement. Id. As such, Petitioner's dissatisfaction with
23 the prison law library does not provide good cause to overcome the procedural bar.

24 Petitioner cannot claim that Lewis applies because his Tenth Petition was not rejected
25 on a technicality. Instead the Court concluded that his claims were not properly raised in the
26 pleading filed. Order of Affirmance at 2. While Petitioner asserts that his lack of legal
27 knowledge prevented him from knowing that he had to file a Petition for Writ of Habeas
28 Corpus, that claim is belied by the fact that it was the Tenth Petition for Writ of Habeas

1 Corpus he filed. As such, it is clear that Petitioner knew the proper procedure for challenging
2 his Judgment of Conviction was through a Petition for Writ of Habeas Corpus. He cannot
3 now claim ignorance of that process.

4 Therefore, Petitioner has failed to establish good cause for delay. Petitioner is alleging
5 no new information he just gained access to that would make it reasonable to wait nearly
6 four decades to challenge his counsel's ineffectiveness. As such, the Court dismisses
7 Petitioner's Twelfth Petition.

8 **IV. PETITIONER HAS NOT ESTABLISHED PREJUDICE.**

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

14 Petitioner claims he can demonstrate actual prejudice pursuant McCoy. Twelfth
15 Petition at 14. Petitioner explains that McCoy precluded his counsel from conceding his guilt
16 to one of the sexual assaults and that counsel doing so amounts to structural error. Id. at 9-11.

17 Petitioner's claim is belied by the record. Counsel never conceded his guilt.
18 Petitioner's provided excerpts of the closing argument establish that after counsel finished
19 arguing that there was not enough evidence of Petitioner's guilt of Counts 1 or 2, he
20 explained that if he ended his argument then, all the jury could find him guilty of was sexual
21 assault. Recorder's Transcript of Hearing, Jury Trial: Friday May 1, 1981, Monday May 4,
22 1981, at 476. Counsel then proceeded to argue that there was no proof beyond a reasonable
23 doubt that he was guilty of sexual assault. Id. at 476-82. Counsel referenced Petitioner's
24 testimony, attacked the victim's credibility, and argued how Petitioner's actions were not
25 that of someone who committed a crime. Id. 482-83; 486-87. Finally, counsel concluded his
26 arguments by stating that “every act done in this case is consistent with innocence,” and
27 asked the jury to return a verdict of “Not Guilty.” Id. 478.

28

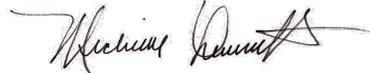
1 At no point did counsel tell the jury Petitioner was guilty of sexual assault. Therefore,
2 Petitioner's claim is belied by the record and this Court dismisses his Twelfth Petition as
3 procedurally time barred with no good cause or prejudice shown.

4 **ORDER**

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

7 DATED this _____ day of September, 2021.

Dated this 13th day of September, 2021



9 **DISTRICT JUDGE**

**208 B58 F5EF F39A
Michelle Leavitt
District Court Judge**

10 STEVEN B. WOLFSON
11 Clark County District Attorney
Nevada Bar #001565

12 BY



13 **ALEXANDER CHEN**
14 Chief Deputy District Attorney
Nevada Bar #10539

1 **CSERV**

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

5
6 Joel Burkett, Plaintiff(s)

CASE NO: A-19-788633-W

7 vs.

DEPT. NO. Department 12

8 William A Gittere, 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 Findings of Fact, Conclusions of Law and Order was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
14 case as listed below:

15 Service Date: 9/13/2021

16 Eileen Davis

eileen.davis@clarkcountynv.com

17 Alexander Chen

Alexander.chen@clarkcountynv.com

18 If indicated below, a copy of the above mentioned filings were also served by mail
19 via United States Postal Service, postage prepaid, to the parties listed below at their last
20 known addresses on 9/14/2021

21 Joel Burkett

ESP
P.O. Box 1989
Ely, NV, 89301

22
23 Steven Wolfson

Juvenile Division - District Attorney's Office
601 N Pecos Road
Las Vegas, NV, 89101

24
25
26
27
28

A-19-788633-W Joel Burkett, Plaintiff(s)
vs.
William A Gittere, Defendant(s)

May 19, 2020 08:00 AM Minute Order

HEARD BY: Leavitt, Michelle COURTROOM: Chambers

COURT CLERK: Pannullo, Haly

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

The court reviewed the pleadings submitted and hereby denies petitioners twelfth Petition For Writ of Habeas Corpus. The petition is time barred. The petition is also successive.

Mr. Chen, Esq. to prepare the Order for the court. The hearing scheduled for May 19, 2020 is vacated.

CLERK'S NOTE: The above minute order has been distributed to:
Alexander.Chen@clarkcountyda.com hvp/5/19/20

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES

JOEL BURKETT,

Plaintiff(s),

vs.

WILLIAM A. GITTERE,

Defendant(s),

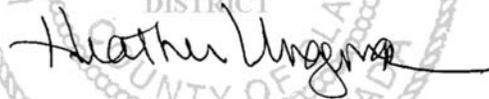
Case No: A-19-788633-W

Dept No: XII

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 3 day of November 2021.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

