

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM JOSEPH MCCAFFREY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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RESPONDENT'S ANSWERING BRIEF

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WILLIAM JOSEPH MCCAFFREY,

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Appellant

v.

THE STATE OF NEVADA,

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_____ /

RESPONDENT'S ANSWERING BRIEF

I. ROUTING STATEMENT¹

This is a post-conviction appeal from an order dismissing Appellant William Joseph McCaffrey's (hereinafter, "McCaffrey") untimely Petition for Writ of Habeas Corpus (Post-Conviction). McCaffrey pleaded guilty below to promotion of sexual performance of a minor, category A felony, so this case is not presumptively assigned to the Court of Appeals. Appellant's Appendix ("AA"), 4-9; *see also* NRAP 17(b)(3). Nor is this case presumptively assigned to the Nevada Supreme Court. NRAP 17(a). As such, the Nevada Supreme Court may exercise its discretion to retain the matter or assign it to the Court of Appeals.

¹ The State agrees with Appellant William Joseph McCaffrey's Jurisdictional Statement and will not repeat the same herein. NRAP 28(b).

II. STATEMENT OF THE CASE/STATEMENT OF FACTS²

McCaffrey's judgment of conviction pursuant to his guilty plea was entered on October 9, 2009. AA, 18, 22-23. Petitioner's direct appeal was unsuccessful. *See McCaffrey (William) v. State*, Dkt. No. 54873 (Order of Affirmance, filed July 15, 2010). Remittitur was issued on August 10, 2010. *See id.*

More than ten (10) years later, on October 20, 2020, McCaffrey filed the Petition for Writ of Habeas Corpus (Post-Conviction) at issue here. AA, 24-94. Counsel was appointed for McCaffrey and the State was ordered to respond to the Petition. On February 4, 2021, the State filed a motion to dismiss the Petition in its entirety. *Id.* at 95-99. On May 3, 2021, McCaffrey filed an emergency motion and opposition in pro per. *Id.* at 100-144. On June 9, 2021, McCaffrey, through counsel, filed his response to the State's motion to dismiss. *Id.* at 145-150. On June 21, 2021, the State filed a reply in support of its motion to dismiss. *Id.* at 151-157.

On August 9, 2021, the district court issued an order granting the State's motion to dismiss. *Id.* at 160-166. The district court found that McCaffrey's Petition was untimely because it was filed more than ten (10)

² To the extent underlying facts are required for the resolution of this appeal, they will be discussed in the argument section of this brief.

years after remittitur. *Id.* at 161. As the district court noted, McCaffrey asserted three main grounds to overcome the procedural bar: (1) he is untrained in the law; (2) deficiencies of his prior post-conviction counsel; and (3) former Detective Dennis Carry fabricated evidence in this case. *Id.* However, the district court correctly found that none of the reasons asserted were sufficient to overcome the procedural bar and addressed each argument with authority and analysis. *See id.* at 161-163. The district court also rejected the new claims McCaffrey attempted to assert in response to the State's motion to dismiss. *Id.* at 163-164. The district court found the claims were procedurally barred and were also bare, naked, and conclusory. *Id.* Thus, the district court granted the State's motion to dismiss. *Id.* at 165.

The notice of entry of order was completed the next day. *Id.* at 159-159. McCaffrey filed a pro se notice of appeal on August 16, 2021. *Id.* at 167-168.

III. STATEMENT OF ISSUES

Whether the district court abused its discretion by dismissing McCaffrey's untimely Petition without an evidentiary hearing?

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IV. SUMMARY OF ARGUMENT

McCaffrey filed an untimely Petition and did not adequately plead good cause and actual prejudice to overcome the mandatory procedural bar present in NRS 34.726(1). The district court did not abuse its discretion by dismissing the Petition without an evidentiary hearing.

V. ARGUMENT

A. Standard of review.

A petitioner is entitled to an evidentiary hearing on a post-conviction petition only if he has asserted specific factual allegations that are not belied or repelled by the record and, if true, would entitle him to relief. *Nika v. State*, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008). Appellate courts review a district court's decision on whether to hold an evidentiary hearing for abuse of discretion. *See Rubio v. State*, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008).

B. The district court did not abuse discretion by dismissing McCaffrey's untimely Petition without an evidentiary hearing.

- i. *McCaffrey's Petition was untimely, and he did not sufficiently allege good cause or actual prejudice to overcome the procedural bar.*

NRS 34.726(1) requires a post-conviction petition to be filed within one (1) year of remittitur, absent a showing that the delay was not the fault of the petitioner and that dismissal of the petition as untimely will unduly

prejudice the petitioner. The Petition at issue here was filed over ten (10) years after remittitur. As such, the district court was required to dismiss the Petition unless McCaffrey pled good cause and actual prejudice for each ground raised in his Petition. NRS 34.726(1); *see also Chappell v. State*, 137 Nev. Adv. Op. 83, 501 P.3d 935, 949 (2021) (providing that “NRS Chapter 34 requires a petitioner to identify the applicable procedural bars for *each* claim presented” and that the “petitioner’s explanation of good cause and prejudice for each procedurally barred claim must be made on the face of the petition”) (*citing State v. Haberstroth*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003))).

McCaffrey provided three general reasons for his delayed filing on the face of his Petition. First, McCaffrey claimed he was actually innocent of the crime and the detective that investigated his case fabricated evidence. AA 32-34, 122, 128-129. Initially, it is not clear that factual innocence claims are appropriate in plea cases, since they are often based on legal fictions to afford a defendant a beneficial plea bargain. *See e.g., Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222 (1984) (rejecting an actual innocence claim in a plea case because the claim of innocence was “essentially academic”). Even setting that issue aside, McCaffrey failed to explain why his factual innocence claim was not presented timely. *See*

Hathaway v. State, 119 Nev. 248, 253-254, 71 P.3d 503 (2003) (holding that all claims reasonably available must be made within the one-year period).

McCaffrey claimed that the detective who investigated him fabricated evidence. Yet, his claim was based on the arrest of the detective many years after his plea for crimes associated with the detective's personal life. McCaffrey did not allege any facts to show or explain what evidence was allegedly fabricated in this case. Nor did McCaffrey explain why he pleaded guilty if he believed that the charges were based on fabricated evidence. The fabricated evidence claim was available to him at the time of his plea; thus, it did not present good cause to excuse the procedural time bar in this case. As the district court found, McCaffrey:

... was in the unique position at the time of his plea to know which offenses he did or did not commit. Thus, [McCaffrey] should have been reasonably alerted at that time if he believed evidence was fabricated. Instead of raising that issue at the time, [McCaffrey] decided to plead guilty. Because such a claim was reasonably available to [McCaffrey], it is subject to the one-year statutory period. Thus, [McCaffrey's] claim that a detective fabricated evidence fails to demonstrate good cause.

AA, 163.

McCaffrey has failed to demonstrate the district court abused its discretion by rejecting his faulty claim of good cause concerning his innocence or the fabrication of evidence.

McCaffrey's second assertion of good cause concerned allegations of deficiencies stemming from the appointment of Mary Lou Wilson to represent him in 2014 in connection with his motion to modify his sentence. AA, 34-37. Ms. Wilson was not appointed until four (4) years after remittitur and McCaffrey did not present his claim in a timely manner since it stems from conduct which occurred in 2014. *See Pellegrini v. State*, 117 Nev. 860, 874-878, 34 P.3d 519 (2001) (once a claim becomes available a one-year deadline applies) (*abrogated on other grounds, as recognized in Slaughter v. State*, 2022 WL 500612, 504 P.3d 523 (table), Dkt. 82602 (Nev. Feb. 17, 2022) (*unpublished disposition*)). More importantly, though, this is not a capital case, and any deficient performance by Ms. Wilson does not establish good cause to excuse McCaffrey's procedural default. *Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867 (2014) ("[w]e have consistently held that the ineffective assistance of post-conviction counsel in a noncapital case may not constitute 'good cause' to excuse procedural defaults."). The district court rejected McCaffrey's assertion of good cause for these reasons. AA, 162.

McCaffrey's final claim of good cause involved the fact that he is untrained in the law. *Id.* at 38. However, the Nevada Supreme Court has previously held that being untrained in the law is not a sufficient excuse to

overcome the applicable procedural bars. *Phelps v. Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303 (1988) (overruled on other grounds as recognized in *Gallimort v. State*, 202 WL 6742954, 476 P.3d 435 (Table), Dkt. No. 80191 (Nev. Nov. 13, 2020) (*unpublished disposition*)). The district court rejected McCaffrey's assertion of good cause and cited this controlling authority. AA, 161-162.

McCaffrey did not allege actual prejudice on the face of his Petition. Nor could he show that errors occurred that worked to his actual and substantial disadvantage. *See State v. Eighth Jud. Dist. Ct. (Riker)*, 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005). At the time of arrest, detectives recovered approximately 500,000 to 1,000,000 images and videos of child pornography from McCaffrey's computer and in his home. Presentence Investigation Report, 4.³ He had printed pictures, CDs and DVDs, as well as files on his computer. *Id.* McCaffrey's brother informed detectives during their search that he was increasingly concerned about McCaffrey because he was looking at pornography where participants were "too young". *Id.*

³ The State is contemporaneously moving to transmit the PSI in this case. The cited pagination conforms with the original document.

McCaffrey also admitted to watching and possessing child pornography for the last four years during his interview with police. *Id.* He admitted that he was most sexually stimulated by 8 to 10 years olds at the time of the interview and that he knew child pornography was illegal, but he considered it art and natural. *Id.* at 4-5. McCaffrey also admitted to filming children at a party, in their clothes, but admitted that what he was filming would be considered inappropriate. *Id.* at 5. Some of the videos recovered from McCaffrey's room and computer showed children as young as three years old being anally and vaginally penetrated. *Id.* at 5. Another video showed a child as young as three performing fellatio on an erect penis until the male ejaculated into the child's mouth. *Id.* Given the evidence recovered and McCaffrey's admissions to police at the time of his arrest, McCaffrey has not shown, nor could he show, actual prejudice for the district court applying the procedural bar and leaving the status quo on his negotiated plea and sentence.

In sum, the district court provided a reasoned decision after considering the pleadings and arguments presented by the parties. McCaffrey failed to show good cause or actual prejudice to excuse his untimely Petition. The district court applied the controlling law. Thus, McCaffrey has failed to demonstrate that the district court abused its

discretion by finding his Petition untimely and rejecting his faulty assertions of good cause. *See Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (explaining that an abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason).

- ii. *The district court was not required to consider the merits of McCaffrey's claims or the claims presented in McCaffrey's response to the State's motion to dismiss.*

On appeal, McCaffrey details the substance of the four claims he asserted in his Petition. The district court did not reach the merits of his claims because it found his Petition was untimely. Indeed, it would have been error for the district court to reach the merits of the claims raised in his untimely Petition. *See Riker*, 121 Nev. at 231, 112 P.3d at 1074. This Court should not evaluate the merits of his claims either.

Similarly, McCaffrey cites to nine new grounds he attempted to raise in his Response to the State's motion to dismiss. The district court correctly concluded that his new claims were an attempt to expand his Petition and were procedurally barred pursuant to NRS 34.726(1). AA, 163. As the district court noted, McCaffrey did not explain why it took so long to assert his claims—many having to do with events that occurred before his plea or at the time of sentencing. *Id.* at 164. Further, every allegation was

bare, naked, and conclusory. *Id.* Some of the claims were waived by his plea itself. *See id.* at n. 2 (claims 2, 3, 4, 8, and 9). In other words, the new claims did not follow the form requirements of NRS Chapter 34, were untimely under NRS 34.726(1), and were bare and naked as prohibited in *Hargrove*, 100 Nev. at 502, 686 P.2d at 225 (holding that to the extent the claim includes bare or naked allegations, the petitioner is not entitled to an evidentiary hearing). McCaffrey did not plead facts to show, if his allegations were true, that he would be legally entitled to a hearing or to relief. As such, McCaffrey failed to show that the district court abused its discretion by rejecting the claims presented in his Response without an evidentiary hearing.

VI. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the district court's order dismissing his Petition.

DATED: April 4, 2022.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Marilee Cate
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CERTIFICATE OF COMPLIANCE

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

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

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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

DATED: April 4, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on April 4, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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/s/ Tatyana Kazantseva
TATYANA KAZANTSEVA