In the Supreme Court of the State of Nevada

No. 85513

DUJUAN LOOPER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

APPELLANT'S OPENING BRIEF

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Table of Contents to Opening Brief of Dujuan Looper

Table of Authorities

Nevada

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUJUAN LOOPER, Appellant v. THE STATE OF NEVADA, Respondent.	NO. 85513

APPELLANT'S OPENING BRIEF

I. JURISDICTIONAL STATEMENT

Appellant DUJUAN LOOPER appeals from the postconviction Findings of Fact Conclusions of Law & Order (FFCO) issued October 13, 2022 [2AA435-449] pursuant to a writ of habeas corpus action A-22-856419-W initiated August 2, 2022. 2AA389-411.

His first writ attorney on a previous postconviction writ of habeas corpus action - stemming from the same criminal case - told him he was going to appeal his FFCO issued

for case C-12-279379-1 August 22, 2017 but did not. 2AA278-289. And Mr. Looper did not find out about the omission until it was too late. 2AA413. He and several others tried to reach him to find out the status. 2AA415-419. His attorney was arrested for acting as an accessory to murder and stealing hundreds of thousands of dollars from clients between November 2015 and February 2017. 2AA325-6.

When Mr. Looper filed a pro per appeal on May 26, 2022 his claim was rejected as untimely. [2AA316-8]. The Nevada Supreme Court found on June 16, 2022 they did not have jurisdiction to review his plea withdrawal efforts via a postconviction petition for writ of habeas corpus and the subsequent FFCO. 2AA333-334.

The District Court then appointed Mr. Looper this attorney on July 2, 2022. A second postconviction writ of habeas corpus petition was filed and denied. 2AA389-411. Denial date October 12, 2022. 2AA435.

Nevada law permits an appeal from a district court order refusing a new trial and or order on a writ action. See NRS §34.575; NRS §177.015(1)(c).

> **NRS 34.575 Appeal from order of district court granting or denying writ.**
> 1. An applicant who, after conviction or while no criminal action is pending against the applicant, has petitioned the district court for a writ of habeas corpus and whose application for the writ is denied, may appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution from the order and judgment of the district court, but the appeal must be made within 30 days after service by the court of written notice of entry of the order or judgment.

A timely proper notice of appeal was submitted on October 13, 2022. 2AA451-453. The due date for the Opening Brief and Appendices is March 1, 2023.

II. ROUTING STATEMENT

Dujuan Looper's appeal is presumptively assigned to the Court of Appeals pursuant to Nevada Rules of Appellate Procedure [NRAP] Rule 17(b)(3) and (7) because it is a postconviction appeal from an action based on a plea of guilty to two (2) Category B Felonies and one (1) Category

C Felony. Judgment of Conviction May 23, 2014. 1AA91-92.

III. STATEMENT OF THE ISSUES

A. This Court should Reconsider Stare Decisis Cited by the District Court and find this action not time barred.

B. The District Court Error in finding that Looper Cannot Demonstrate Good Cause and Prejudice Sufficient to Overcome his Procedural Bars.

IV. STATEMENT OF THE CASE

A police report was filed against Mr. Looper on Monday January 9, 2012 by his live in girlfriend claiming he had abused her and her two children that weekend. 30 years old at the time he had no criminal record of sexual abuse to anyone ever. 1AA33-65 at 35. And his entire criminal record spanning 12 years of his adult life, consisted of one misdemeanor and one minor felony conspiracy to commit robbery. 1AA34. Two Justice Court cases were created

naming Looper as the defendant. The two cases were shortly thereafter consolidated: Cases Consolidated February 15 2013 C-12-279379-1 and C-12-279418 – 2AA348-349. An information was issued February 16, 2012 for one count: domestic battery and strangulation a Category C Felony. 1AA1-2.

An Amended Information was issued February 22, 2012 for 6 counts: second degree kidnapping (Category B Felony NRS 200.190); Coercion (Category B Felony – N.R.S. 207.190); Child Abuse & Neglect (13 years old) (Category B Felony – NRS 200.508); Child Abuse & Neglect (9 years old) (Category B Felony – NRS 200.508); Battery Constituting Domestic Violence – Strangulation (Category C Felony – NRS 200.481, 200.485, 33.018); and Battery Constituting Domestic Violence (Misdemeanor – NRS 200.481; 200.485; 33.018). 2AA3-6.

A Second Amended Information issued February 15, 2013 for 9 counts: second degree kidnapping (Category B Felony NRS 200.190); Coercion (Category B Felony – N.R.S. 207.190); Child Abuse & Neglect 13 year old child (Category B Felony – NRS 200.508); Child Abuse & Neglect 9 year old child (Category B Felony – NRS 200.508); Battery Constituting Domestic Violence – Strangulation (Category C Felony – NRS 200.481, 200.485, 33.018); Sexual Assault with a Minor under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366); Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 200.230); Use of Minor in Producing Pornography (Category A Felony – NRS 200.700, 200.710, 200.750); Possession of Visual Presentation Depicting Sexual Conduct of a Child (Category B Felony – NRS 200.700, 200.730). 2AA7-10.

A guilty plea agreement was committed to on January 8, 2014. 1AA14-24. And a third amended information was

filed that day with the guilty plea agreement. 1AA11-13. [Transcript of January 8, 2014 Plea Hearing 1AA25-32].

A Sentencing Memorandum with letters of support evidencing a stable and supportive network of family and friends - and a confidential sealed psychological evaluation concluding he was at a low risk to reoffend was submitted by defense attorney Anthony Sgro on April 22, 2014. 1AA33-65.

At his April 28, 2014 Sentencing – he was sentenced by the Honorable Elissa F Cadish to 134 months to 372 months = 11.16 years to 31 years – with 809 days jail credit (2.22 years). 1AA89-90.

Count 1 96 months to 240 months consecutive
Count 2 19 months to 60 months consecutive to count 1
Count 3 19 months to 72 months consecutive to count 1 and 2
1AA89

Judgment of Conviction (Plea Agreement) 1AA91-2.

A direct appeal no 65608 was filed on his behalf claiming abuse of discretion by the district court for imposing

maximum consecutive sentences and basing the sentencing decision on emotion rather than considering mitigating circumstances. The conviction was affirmed December 11, 2014. 1AA93. The Remittitur issued January 9, 2015 and was filed January 16, 2015.

A timely Proper Petition for Writ of Habeas Corpus (Postconviction) was filed January 16, 2015. 1AA96-119. The District Court ordered a Response to the Petition. 1AA120. Counsel was appointed and the Supplemental Brief to the Petition was submitted April 18, 2016. 1AA121-

2 additional grounds were submitted and briefed by Attorney William H. Gamage, Esq.:

- GROUND ONE - Violation Of Petitioner's 6th Amendment Right to Effective Assistance of Counsel During Plea Negotiations and Sentencing.
- GROUND TWO - Lifetime Supervision Statutes, in Conjunction with Each Other, are Unconstitutionally

Vague in violation of the 5th and 14th Amendments. 1AA121.

The State responded requesting a denial of any relief. 1AA136-147. An evidentiary hearing was granted and held July 6, 2017. Transcript: 1AA148-230; 2AA231-274. Three people gave testimony: 2 of his trial counsel Melinda Weaver (appearing via video from Hawaii) [1AA152- 195]; Marjorie Kratsas [1AA186-222] and petitioner Dujuan Looper [1AA222-230; 2AA231-255]. Attorney Gamage was present on behalf of Mr. Looper at the hearing. 1AA150.

The Findings of Fact Conclusions of Law and Order denying all relief was issued April 22, 2017. Mr. Looper has sworn under penalties of perjury that Attorney Gamage assured him that if they lost the action he would file an appeal. 2AA412-414. He knew that appeals were a lengthy process and it would be a while before he heard anything. But after waiting a very long time and many

attempts to talk to Attorney Gamage he filed a notice of appeal on his own. **May 26, 2022** Handwritten Notice of Appeal. 2AA316-318. It was too late and the Nevada Supreme Court found they did not have jurisdiction to consider the appeal. **June 16, 2022** Order Dismissing Appeal 84804. 2AA333-334. **August 1, 2022** Remittitur 84804 (issued July 12 2022). 2AA335-336. Next the District Court appointed this attorney to assist with a postconviction petition for writ of habeas corpus action. 2AA386-388. A petition for writ of habeas corpus with exhibits was eFiled August 2, 2022. 2AA389-411. The State responded September 6, 2022. 2AA420-433. The court denied all relief and on October 12, 2022 issued a Findings of Fact, Conclusions of Law and Order without further briefing. 2AA435-449. A timely proper notice of appeal was submitted on October 13, 2022. 2AA451-453.

V. STATEMENT OF THE FACTS

The female complainant, mother of 2 children a son aged 9 and daughter aged 13 was in a relationship with Looper and they lived together. 1AA69. According to the State, she came home from work on Monday January 9, 2012. She worked nights and left her children in the care of Mr. Looper at times. 1AA68. She was jealous of her boyfriend Looper and thought he might be cheating on her so when she saw his unattended cell phone she picked it up and started nosying through it. 1AA69. On it she found a photo that looked like a female's private parts. She claims to have recognized the clothing in the photo as being her daughter's. 1AA69. So she went and woke up her daughter confronting her about the photo. She claimed Looper heard the dispute and tried to grab the phone – his and hers and tried to flush them down the toilet. The daughter followed her mother's instructions and called the police while they were fighting. They arrived. The phones were destroyed but he and a friend had installed iCloud the day before and so they were able to locate the

photos on her iPad. 1AA70. The 13 year old had problems prior to this action which could have significantly reduced her credibility at trial. And when the defense moved to have access to her juvenile delinquent records the court found them relevant to this action and granted the request. 2AA355. So, not only do we have a jealous girlfriend motivated to lash out at what she suspected to be infidelity, we have a child whose credibility could be impeached on the stand – and photos that could have been taken by anyone in the household with access to iCloud and or friends that have been visiting – which the record demonstrated was everyone. This case is almost identical factually in many respects to the pivotal case on recantation and new information cited frequently in Wisconsin: State v. McCallum, 208 Wis. 2d 463, 469-70, 561 N.W.2d 707, 709 (1997). McCallum was living with his girlfriend and her daughter. The daughter accused him of pinching her breasts twice and he took a plea agreement. But then a year later she retracted her statement stating that a friend of hers had told her it was a

good way to force McCallum to move out of the house. She was upset because she wanted her mom and dad to get back together and admitted she made up the allegations because she thought he was getting in the way of this happening. Id.

VI. SUMMARY OF THE ARGUMENT

This court should reconsider and revise their precedent set in Brown v. McDaniel, and apply a Martinez v. Ryan type exception by allowing Looper to proceed with his action otherwise procedurally defaulted due to untimeliness. Brown v. McDaniel, 130 Nev. 565, 331 P.3d 867 (2014). FFCO 7 – 2AA441. Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012).

We ask this court to depart from stare decisis because the prior decision is based on the conclusory position that allowing exceptions in a case like Looper's would lead to clogging the courts with defendant's who would take advantage of that and appeal their convictions in one way

or another over and over again. There are no statistics or formal studies or even anecdotal incidents cited in the briefing or opinion that support such a conclusion.

Further there are sufficient independent grounds including the merits of the case, prejudice caused, nonexistence of claim at the time of the initial writ that require a reconsideration of Martinez v. Ryan's procedural bar exception to certain Nevada cases.

VII. LEGAL ARGUMENT

Standard of Review: This Court reviews the district court's application of the law de novo. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

'A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review. To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was

deficient and that the deficient performance prejudiced the defense. Deficient performance is representation that falls below an objective standard of reasonableness. To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the trial would have been different. Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy. The reviewing court must try to avoid the distorting effects of hindsight and evaluate the conduct under the circumstances and from counsel's perspective at the time.' Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001). Whorton v. Sheppard, No. 54284, 2010 Nev. LEXIS 72, at *1-2 (June 23, 2010). An appellate court reviews de novo the denial of a petition for a writ of habeas corpus. Shackleford v. Hubbard, 234 F.3d 1072, 1074 (9th Cir. 2000).

A. This Court Should Reconsider Stare Decisis cited by the District Court and find this action not time barred.

Although the doctrine of stare decisis militates against overruling precedent, when governing decisions prove to be unworkable or are badly reasoned, they should be overruled. Harris v. State, 130 Nev. 435, 437, 329 P.3d 619, 620 (2014). By deliberately choosing to move trial counsel ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, a State significantly diminishes prisoners' ability to file such claims. It is within the context of this state procedural framework that counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default. Martinez v. Ryan, 566 U.S. 1, 1, 132 S. Ct. 1309, 1311 (2012).

In Looper's case – he was appointed a postconviction attorney who handled the briefing and the evidentiary hearing. Evidentiary hearings are not often granted – you

have to allege something and provide sufficient support that if found true would merit relief. ___

He ultimately lost. Whether he actually received the FFCO is of no consequence in this action. What matters here is that his attorney told him that if they lost he would file an appeal. 2AA413. So even if Looper ultimately found out he lost – after four years 6 months and four days one would just assume this to be the case. But one would not necessarily assume that their attorney had failed to file the agreed to appeal if he lost. Nor would red flags be raised by the passage of time. Appeals can be slow going, everyone knows that. So he keeps trying to reach his attorney and he starts having his friends try to reach him. 2AA412-419. Ultimately he files a proper appeal May 26, 2022 but the NV Supreme court states it's too late and they don't have jurisdiction to consider it. 2AA333.

The District Court cites NRS 34.726(1) to support their finding that our August 2, 2022 Petition for Writ of Habeas Corpus is time barred. 2AA438-9:

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
(a)That the delay is not the fault of the petitioner; and
(b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

We don't dispute the citations of Pellegrini and Dickerson and Gonzales regarding the plain meaning of this statute and when it starts to run. 2AA439. [Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) FFCO 5, 6: p. 5: The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). p. 6 "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules"); Pellegrini, 117 Nev. at 887, 34 P.3d at 537.]. [p. 4: The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904 p. 5: In Gonzales v. State, the Nevada

Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit. Here, remittitur issued from Looper's direct. p. 6: An external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting Murray v. Carrier, 477 U.S. 478,488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).]. [Dickerson v. State FFCO 5: "The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct

appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998)." FFCO 5. 2AA439.]

But here the simplistic analysis fully ignores the good cause we have shown for filing an action over one year past the issuance of the judgment of conviction. The cause did not exist at the time. The FFCO for the first postconviction habeas action had not been issued – thus there is good cause for why Mr. Looper did not file a petition for writ of habeas corpus action for his attorney's failure to file the agreed to appeal.

It is true that Nevada has taken the position that convicts are not entitled to effective assistance of counsel from their postconviction court appointed attorneys. The District Court cites Brown v. McDaniel to support their finding that Looper fails to establish good cause for filing for delay in filing his 2nd postconviction petition for writ of habeas corpus or for bringing new claims in a successive petition; and undue or actual prejudice. 2AA439. 'First,

Looper was not entitled to effective assistance of counsel in his post-conviction proceedings. The Nevada Supreme Court has "consistently held that the ineffective assistance of post-conviction counsel in a noncapital case may not constitute 'good cause' to excuse procedural defaults." Brown v. McDaniel, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014). 2AA441.

The argument and holdings from the courts go: if we guaranteed effectiveness of the attorneys that we appoint them after they have been convicted, then the 10,000 inmates in Nevada prisons would just appeal their convictions over and over and that would wreak havoc on the court system:

'…Moreover, **we conclude that application of the time bar to successive petitions does not violate the spirit of AB 227 or lead to absurd results**. We have already recognized that the statutory time limit at NRS 34.726(1), like the former one-year time limit at NRS 177.315, evinces intolerance **toward perpetual filing of petitions for relief,** which clogs the **court system and undermines the finality of convictions. A plain reading of AB 227 shows its overall spirit was one of limiting** habeas petitioners to one time through the system absent extraordinary circumstances.' Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).

In Lozada, the Nevada Supreme Court stated:

"Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse postconviction remedies. Lozado v. State, 110 Nev. at 358, 871 P.2d at 950. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Id.

There are no arguments or holdings that Mr. Looper's sought after appeal was an abuse of the legal process and that he is someone wrongly appealing over and over again. He had the legal right to appeal his FFCO. That is undisputed.

NRS 34.575 Appeal from order of district court granting or denying writ.

1. An applicant who, after conviction or while no criminal action is pending against the applicant, has petitioned the district court for a writ of habeas corpus and whose application for the writ is denied, may appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution from the order and judgment of the district court, but the appeal must be made within 30 days after service by the court of written notice of entry of the order or judgment.

Article 6. Judicial Department.

Sec. 4. **Jurisdiction of Supreme Court and court of appeals; appointment of judge to sit for disabled or disqualified justice or judge.**

1. The Supreme Court and the court of appeals have appellate jurisdiction in all civil cases arising in district courts, and also on questions of law alone in all criminal cases in which the offense charged is within the original jurisdiction of the district courts. The Supreme Court shall fix by rule the jurisdiction of the court of appeals and shall provide for the review, where appropriate, of appeals decided by the court of appeals. The Supreme Court and the court of appeals have power to issue writs of *mandamus, certiorari,* prohibition, *quo warranto* and *habeas corpus* and also all writs necessary or proper to the complete exercise of their jurisdiction. Each justice of the Supreme Court and judge of the court of appeals may issue writs of *habeas corpus* to any part of the State, upon petition by, or on behalf of, any person held in actual custody in this State and may make such writs returnable before the issuing justice or judge or the court of which the justice or judge is a member, or before any district court in the State or any judge of a district court.

The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to

assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991).

The party's briefs and three amici brief and ultimate decision in Brown v. McDaniel are clear examples by both sides and all in failing to support or even attempt to attack the conclusory assertion of Houdini like predictions of an onslaught of perpetual filings. And we are not required to successfully claim this with a battery of statistics and studies in order to succeed on the conclusory point. Legal Definition of conclusory : consisting of or relating to a conclusion or assertion for which no supporting evidence is offered conclusory allegations. "… nothing more than a conclusory claim unsupported by specific factual allegations. See Colwell, 118 Nev. Adv. Op. at 59, P.3d at 467 cited in Wallace v. State, 2020 Nev. Dist. LEXIS 249, *29-30. Brown v. McDaniel must be overruled in part to make it more in alignment with Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012).

In Brown v McDaniel, Brown was convicted of first-degree murder with use of a deadly weapon and was sentenced to 2 consecutive sentences of 20 to 50 years. He lost his appeal and made multiple attempts at post-conviction petitions for writ of habeas corpus. Brown tried to analogize and apply the U.S. Supreme Court case which talked about federal writ actions: Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), but the Nevada Supreme Court distinguished it holding that it did not address or apply to state writ of habeas corpus actions rather it only addressed federal actions and procedural defaults at the state level and how that default does not necessarily bar a claim on the merits at the federal level. But even the NV Supreme Court themselves were unsure of how to proceed in light of Martinez. So unsure that they invited the Nevada District Attorneys Association and the Nevada Attorney General and the Nevada Attorneys for Criminal Justice to submit amici briefing on the matter.

But this case discusses much more than just Martinez – over and over it states that the postconviction remedy of writs was envisaged to be a one-time thing where you can make a claim against your trial attorney for prejudicial ineffectiveness as evidenced by the statutory language found in the Nevada Revised Statutes section on writs chapter 34 wherein they state make sure to include all your claims in this petition for ineffectiveness – the uptake is that they find that there is no right to effective assistance of counsel for your writ of habeas corpus counsel and this can be seen in that there is no right constitutional or statutory to be appointed a postconviction counsel – this is an optional remedy at the discretion of the court – and where you do not have a right to something - you do not have a right to claim ineffectiveness.

Brown's case is distinguishable from Looper's case and thus not controlling. In Brown appellant had been convicted of first-degree murder with use of a deadly weapon. His conviction was affirmed. Remittitur issued

February 7, 2006. He was appointed a post-conviction attorney for his writ of habeas corpus. He lost and the district court's judgment was affirmed. Brown v. State, 125 Nev. 1021, 281 P.3d 1157 (Order of Affirmance, 2009). He then filed a second post-conviction petition on June 10, 2010 claiming his first counsel had failed to present claims in the ineffective action that he should have. Id. But the district court found he failed to establish cause which would have excused the procedural bars – untimely and successive. The Nevada Supreme Court affirmed.

Looper's case is far closer to Martinez than Brown. And in fact in the Nevada Attorney General's amici brief they urged the Nevada Supreme Court to decline comparison "…this is not the appropriate case to address Martinez in the first instance…." Amicus Brief in Brown v. McDaniel: Attorney General 13-29099 p. 7. Electronically field September 30, 2013 Appeal 60065.

And there does seem to be some room to argue that there is not a blanket ban on relief via the following part of the McKague Opinion cited by the District Court FFCO7: First, Looper was not entitled to effective assistance of counsel in his post-conviction proceedings. The Nevada Supreme Court has "consistently held that the ineffective assistance of post-conviction counsel in a noncapital case may not constitute 'good cause' to excuse procedural defaults." Brown v. McDaniel, 130 Nev. 565, 569, 331 P.3d 867,870 (2014) (citing McKague v. Warden 112 Nev. 159, 163---65, 912 P.2d 255,258 (1996))/

But read what precedes this in McKague:

McKague failed to demonstrate that he was prejudiced by his counsel's failure to appeal, stating that McKague "failed to demonstrate that the result would have been different had the appeal been timely." McKague v. Warden, Nev. State Prison, 112 Nev. 159, 162-63, 912 P.2d 255, 256-57 (1996).

"Cause," for purposes of excusing procedural default, is not synonymous with "a ground for relief" under 28 U.S.C.S. § 2254(i). A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a *federal court* to consider the merits of a claim that otherwise would have been procedurally defaulted. For example, a "ground for relief" can be an ineffective assistance of trial-counsel claim, a claim that § 2254(i) does not bar. While *§ 2254(i)* precludes a petitioner from relying on the ineffectiveness of his postconviction attorney as a "ground for relief," it does not stop the petitioner from using it to establish *"cause" to excuse procedural default.* Martinez v. Ryan, 566 U.S. 1, 1, 132 S. Ct. 1309, 1311 (2012). A prisoner's inability to present an ineffective-assistance claim is of particular concern because the right to effective trial counsel is a bedrock principle in this Nation's justice system. Id.

'This limited qualification to *Coleman* does not implicate the usual concerns with upsetting reliance interests protected by *stare decisis* principles. The holding here

ought not to put a significant strain on state resources. When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.,* it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards. Martinez v. Ryan, 566 U.S. 1, 15-16, 132 S. Ct. 1309, 1319 (2012).

We urge this court to reconsider this exception in rare cases for Nevada as found herein with Looper.

B. Looper Can Demonstrate Good Cause and Prejudice Sufficient to Overcome his Procedural Bars

Mr. Looper has stated that were it not for the ineffectiveness of his trial counsel he would have rejected the plea offer and demanded a trial. 1AA126 line 12. He outlined in his Supplemental brief precisely how his trial

counsel failed to fully inform of what he needed to know in order to make a knowing voluntary plea:

The nature and requirements of registration as a sex offender as a consequence of his plea to Count; the consequences and procedural aspects of life-time supervision as a consequence of his plea to Count 1; and the extra added hurdles necessary for a child sex offender to obtain parole through a medical and mental health assessment of risk to re-offend. 1AA126.

These arguments were found to have sufficient weight such that if they were proven true his plea would be withdrawn. A rarely granted evidentiary hearing was scheduled for him. After he lost he was legally entitled to file an appeal of that ruling. And now he is being told that though the courts find they were doing him a favor in granting him an attorney to help they were actually doing a disservice because it lulled him into complacency when his attorney assured him this would be taken care of if they lost. As seen by his subsequent action he certainly would have taken it upon himself to file an appeal had he known.

And as to the strength of his case if he took this to a jury trial. It is not all open and shut for the State. And as can be seen by the State v. McCallum, 208 Wis. 2d 463, 469-70, 561 N.W.2d 707, 709 (1997) – just because he took the plea does not necessarily mean the admission would have been given if he took the matter to trial either to the court or to his own attorney - which would have left the State to prove their case and without Looper's support this was not an ideal route for the State:

She worked nights and left her children in the car of Mr. Looper at times. 1AA68. She was jealous of her boyfriend Looper and thought he might be cheating on her so when she saw his unattended cell phone she picked it up and started nosing through it. 1AA69. On it she found a photo that looked like a female's private parts. She claims to have recognized the clothing in the photo as being her daughter's. 1AA69. So she went and woke up her daughter confronting her about the photo. Her

daughter had admittedly had a friend over the night before. She claimed Looper heard the dispute and tried to grab the phone – his and hers and tried to flush them down the toilet. The daughter followed her mother's instructions and called the police while they were fighting. They arrived. The phones were destroyed but he and a friend had installed iCloud the day before and so they were able to locate the photos on her iPad. 1AA70. The 13 year old had problems prior to this action which could have significantly reduced her credibility at trial. And when the defense moved to have access to her juvenile delinquent records the court found them relevant to this action and granted the request. 2AA355. So, not only do we have a jealous girlfriend motivated to lash out at what she suspected to be infidelity, we have a child whose credibility could be impeached on the stand – and photos that could have been taken by anyone in the household with access to iCloud and or friends that have been visiting – which the record demonstrated was everyone.

VIII. CONCLUSION

Wherefore we ask that this court reverse the denial of relief by the District Court and find that he has actionable relief for the failure of his writ attorney to file an appeal of the first Findings of Fact Conclusions of Law & Order.

DATED this 28TH Day of February 2022.

Respectfully Submitted,

/s/ Diane C. Lowe
DIANE C. LOWE ESQ. Nevada Bar #14573

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 Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 5,603 words;

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

DATED this 28TH Day of February 2023.

Respectfully Submitted,

/s/ Diane C. Lowe
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NRAP 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Dujuan Looper is an individual and there are no corporations, parent or otherwise, or publicly held companies requiring disclosure under Rule 26.1;

2. Appellant Dujuan Looper is represented in this matter by Diane C. Lowe, Esq., Nevada Bar #14573. He was represented by William Gamage Nevada Bar 9024 at the first postconviction action. His trial attorneys included

Vicki Greco Bar 8476, Anthony Sgro Bar 3811 Brandon Smith Bar 7917 Daniel Page Bar 10706 Amy A Coffee Bar 6625 Maria T. Cleveland Bar 5261 James Ohrenschall Bar 12059 Daniel Page, Esq. Bar 10706 Philip J. Kohn, Esq. Public Defender Bar 556 Roy Nelson, Esq. Bar 635 Kevin C. Leik Bar 8743 Maria T Cleveland Bar 5261 Anthony P. Sgro Esq Bar 3811 Gregory Cortese Bar 6610 Johnathan Macarthur Bar 7072 Melinda Weaver Bar 11481 Marjorie Kratsas Bar 12934.

Respectfully Submitted,

/s/ Diane C. Lowe
DIANE C. LOWE ESQ. Nevada Bar #14573

CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify and affirm that this document and the *amended* appendix were electronically filed with the Nevada Supreme Court on February 28, 20223. Electronic Service of the foregoing document and appendix shall be made in accordance with the Master Service list as follows:

Steven B. Wolfson Clark County District Attorney / formerly Alexander G. Chen

Aaron D. Ford Attorney General Carson City