

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADRIAN POWELL,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

S. Ct. No. 85955
D.C. NO.: A-21-819263-W
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APPELLANT'S REPLY BRIEF

Colleen Savage, Esq.
Nevada Bar No. 14947
SGRO & ROGER
2901 El Camino Ave., Suite 204
Las Vegas, Nevada 89102
Telephone: (702) 384-9800
Facsimile: (702) 665-4120
csavage@sgroandroger.com
Attorney for Appellant

STEVEN B. WOLFSON, ESQ.
Nevada Bar No. 1565
Clark County District Attorney
Clark County District Attorney's
Office | 200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2500
Attorney for Respondent

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SUMMARY OF THE ARGUMENT

Appellant Adrian Powell (hereinafter “Appellant” or “Mr. Powell”) relies upon the Statement of Facts as set forth in his Opening Brief electronically filed May 30, 2023. The Opening Brief raised the pivotal issue that at nearly every step of the judicial process, Mr. Powell received ineffective assistance of counsel to his detriment. In response, Respondent’s Answering Brief raised three key issues: (1) Mr. Powell’s habeas petition was procedurally time-barred; (2) the assertion that Mr. Powell’s alleged failure to address substantive issues on direct appeal resulted in their waiver; and (3) res judicata bars claims regarding the voluntariness of the plea.

Mr. Powell's petition is not procedurally time-barred, as he has demonstrated good cause and actual prejudice, thereby warranting this Court's consideration of the matter on its merits. Additionally, Mr. Powell has not forfeited the substantive claim regarding the constitutionality of his convictions for both robbery and kidnapping; rather, this constitutional concern serves as an illustration of the ineffectiveness of his legal counsel. Likewise, the doctrine of res judicata does not bar the claims related to the voluntariness of the plea for this same reason.

Thus, Mr. Powell now respectfully requests that this Court reverse the district court’s order denying Mr. Powell’s Petition for Writ of Habeas Corpus for the reasons set forth within Appellant’s Opening Brief and herein.

LEGAL ARGUMENT

I. APPELLANT’S PETITION IS NOT PROCEDURALLY BARRED

Mr. Powell has demonstrated good cause to overcome the procedural bar stemming from the one-year filing deadline for a postconviction petition for a writ of habeas corpus. “[G]ood cause for delay exists if the petitioner demonstrates to the satisfaction of the court: (a) [t]hat the delay is not the fault of the petitioner; and (b) [t]hat dismissal of the petition as untimely will unduly prejudice the petitioner.” NRS 34.726(1); *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

A. Mr. Powell Has Established Good Cause to Overcome the Procedural Time Bar

To establish the first prong of the test set forth in NRS 34.726(1), the petition must show “that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” *Huebler*, 128 Nev. at 197, 95 (2012) (citing *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)). The Court further defined an “impediment external to the defense” as “a showing 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.* (citations and quotations omitted). “In terms of a procedural time-bar, an adequate allegation of good cause would sufficiently explain why a petition was filed beyond the statutory time period.” *Hathaway*, 119 Nev. at 252-253, 71 P.3d at 506.

Generally, mere attorney error would not overcome the procedural bar, however, the Nevada Court of Appeals recently established a framework for evaluation if an allegation for good cause for delay based on special circumstances in *Harris v. State*, 133 Nev. 683, 688, 407 P.3d 348, 352 (Nev. App. 2017). The *Harris* test states that: (1) the Petitioner must show that they believed counsel timely filed that petition, (2) the belief was reasonable, (3) counsel then abandoned Petitioner without notice and failed to timely file the petition, and (4) the Petition was filed within a reasonable time after the Petitioner should have known counsel did not file the petition. *Harris v. State*, 133 Nev. 683, 688, 407 P.3d 348, 352 (Nev. App. 2017). Each factor is analyzed separately below.

(1) Mr. Powell believed his counsel timely filed his petition.

Before Mr. Powell was sentenced, he expressed reservations about his legal representation and was subsequently assigned a new attorney, Monique McNeil. Following her appointment, Ms. McNeil filed a Motion to Withdraw Guilty Plea on Mr. Powell's behalf. (JA, II; APP000322- APP000334). The district court denied the motion, and Mr. Powell was sentenced on May 22, 2019. (JA, II; APP000384-APP000407). Following the judgment of conviction, Ms. McNeil filed a Notice of Appeal challenging the district court's denial of the Motion to Withdraw the Guilty Plea on June 14, 2019. (JA, II; APP000384- APP000407). Upon completion of briefing on appeal, the matter was remanded to the district

court for the purpose of conducting an evidentiary hearing, which took place on August 13, 2020. (JA, II; APP000423- APP000459). Ultimately, the district court determined that Mr. Powell was not entitled to relief based upon ineffective assistance of counsel, and the Findings of Fact and Conclusions of Law and Order was filed on March 4, 2021. (JA, III; APP000465-APP000480). Thereafter, Mr. Powell and Ms. McNeil discussed filing an appeal. As set forth within her affidavit, Ms. McNeil stated that she intended on filing an appeal, yet failed to do so because she miscalculated the deadline. (JA, III; APP000498). Furthermore, Ms. McNeil admitted that she neglected to inform Mr. Powell about his right to submit a Post-Conviction Petition for Writ of Habeas Corpus (hereinafter "Petition") and the required timeframe for doing so. Consequently, Mr. Powell was deprived of the opportunity to submit the Petition within the stipulated time frame on his own.

After the March 4, 2021 Order, Mr. Powell operated under the assumption that Ms. McNeil had executed the filing of the Petition as they had discussed. He had no reason to suspect that Ms. McNeil would miscalculate the deadline, ultimately preventing him from seeking relief.

(2) Mr. Powell's belief was reasonable.

Ms. McNeil was appointed as Mr. Powell's attorney specifically for the task of handling the filing of a Motion to Withdraw the Guilty Plea and any

subsequent appeal. *Id.* In light of her specific role, it is entirely reasonable for Mr. Powell to have placed his trust in Ms. McNeil's ability to file the Petition in a timely manner. Their discussions and the context of her representation further reinforced Mr. Powell's expectation that Ms. McNeil had indeed submitted the Petition as previously discussed.

Furthermore, it is crucial to emphasize that Mr. Powell's trust in Ms. McNeil went beyond mere verbal agreements. Her role as his legal representative inherently included the responsibility of keeping detailed records to track important deadlines and guarantee the timely submission of the Petition within the statutory timeframe. Considering the inherent nature of her professional duties in this context, Mr. Powell's belief that she would fulfill her professional obligations was not only a reasonable expectation, but a firmly grounded one.

(3) Counsel abandoned Mr. Powell without notice and failed to timely file the petition.

While Ms. McNeil did not abandon Mr. Powell overtly, she did abandon her duty to him by failing to maintain proper records keeping track of strict deadlines. On August 5, 2021, Ms. McNeil sent Mr. Powell a letter, informing him of her oversight in failing to calendar the correct deadline for the Petition. (JA, III; APP000500). That same day she also drafted a declaration which states in relevant part:

6. I did not file a Notice of Appeal after that hearing, as I sadly and

embarrassingly miscalculated the date.

7. Mr. Powell missed the date to appeal the court's decision after the hearing due to my error, which was inexcusable.

8. Mr. Powell missed his opportunity to file a timely petition for writ of habeas corpus because of my error... (JA, III; APP000498).

Ms. McNeil's error and mental abandonment caused her to miss the deadline and not file the Petition in a timely manner. Ms. McNeil's abandonment was also apparent when Mr. Powell filed his own Petition and subsequent Motion to Withdraw as Counsel without the assistance of Ms. McNeil. (JA, III; APP000557-APP000563).

(4) The Petition was filed within a reasonable time after Mr. Powell learned counsel did not file the petition.

Mr. Powell was placed on notice of the missed deadline on August 5, 2021, and on August 10, 2021, he expeditiously filed his Pro Se Petition for Writ of Habeas Corpus (Post Conviction). (JAIII; APP000501-APP000521).

Thus, for the aforementioned reasons, Mr. Powell has effectively established compelling grounds to overcome the procedural impediment. Consequently, it is imperative that his Petition receives fair consideration and is not subject to dismissal due to a procedural error that was entirely beyond his influence or control.

Mr. Powell's presentation of substantial justification serves as a compelling rationale for the court to exercise its discretion in his favor. The circumstances

surrounding the procedural error, as elucidated in previous discussions, underscore the essential point that Mr. Powell should not be penalized for an aspect of the legal process over which he had no authority or oversight.

In light of these factors, it is incumbent upon the court to uphold the principles of justice and fairness by refraining from dismissing Mr. Powell's Petition on the grounds of a procedural error that he had no power to prevent or rectify.

B. Dismissal Will Result in Undue Prejudice to Mr. Powell

In accordance with the second prong of NRS 34.726(1), Mr. Powell can demonstrate that dismissal of the petition as untimely will cause him to suffer undue prejudice. NRS 34.726(1); *Huebler*, 128 Nev. at 197, 275 at 95. While NRS 34.726 requires a petitioner to establish both that (1) the delay is not the fault of the petitioner; and (2) that dismissal of the petition as untimely will unduly prejudice the petitioner, the test for undue prejudice under NRS 34.726(1)(b) should be separate and distinct from the test for prejudice to overcome other procedural bars. *Harris*, 133 Nev. at 691 (2017). The *Harris* Court stated, “Were we free to do so, we would hold, where a petitioner has demonstrated cause for the delay under the test identified above, a petitioner will have demonstrated undue prejudice under NRS 34.726(b).” *Id.* at 691.

Here, it is clear that dismissal will result in prejudice for Mr. Powell. Through no fault of his own, his prior counsel missed the assigned deadline to file the Petition based on a calendaring error, and his constitutional rights should not impacted due to her oversight. In Ms. McNeil's own words:

8. ...Mr. Powell faces prejudice because due solely to my error, he missed deadlines to file appellate/post-conviction documents because he was unaware of the dates. Mr. Powell relied on me, and I failed to properly do my job. It is solely my error that causes Mr. Powell's petition to be untimely.

9. I believe Mr. Powell has legitimate issues to litigate and my failure has cause him prejudice by potentially putting him a position to be denied the ability to litigate legitimate issues. This denies Mr. Powell his constitutional rights. (JA, III; APP000498-APP000499)

Therefore, affirming the district court's denial of the Petition would result in severe prejudice to Mr. Powell, and run counter to the fundamental principles of justice.

II. MR. POWELL'S INCLUSION OF THE KIDNAPPING AND ROBBERY CHARGES WAS NOT AN ATTEMPT TO RELITIGATE PREVIOUSLY DECIDED SUBSTANTIVE ISSUES BUT WAS INSTEAD MEANT TO HIGHLIGHT MR. POWELL'S INEFFECTIVE ASSISTANCE OF COUNSEL

The State contends that Mr. Powell's assertions regarding his convictions for both robbery and kidnapping constitute substantive claims that were waived due to their absence in a direct appeal. Furthermore, the State underscores that a Petition should only be dismissed if it pertains to matters other than those concerning the voluntariness or knowledge of the plea or the effectiveness of

counsel. However, this argument is flawed on two fronts: first, Mr. Powell's discussion of the kidnapping and robbery charges did not constitute a substantive claim, and second, it directly relates to the plea's entry lacking effective assistance of counsel.

The State's argument fails to establish a connection between the alleged ineffectiveness of counsel and Mr. Powell's omission of a pretrial Writ of Habeas Corpus regarding the kidnapping and robbery charges. A truly competent and effective attorney would have been aware that, provided the kidnapping was incidental to the robbery, the defense could, and should challenge the kidnapping charges before the trial. Regrettably, Mr. Powell's counsel failed to take this crucial step. Contrary to the State's characterization, Mr. Powell is not seeking to re-litigate issues or claim any abuse of discretion by the district court. Instead, he has included this example to underscore one instance of his prior counsel's ineffectiveness.

Thus, as this was not a substantive claim but rather a specific illustration of Mr. Powell's previous counsel's ineffectiveness, no claim has been waived. It is imperative that this error be considered when assessing whether Mr. Powell received ineffective assistance of counsel.

III. MR. POWELL DOES NOT WISH TO RELITIGATE ALREADY DECIDED ISSUES BUT INSTEAD SEEKS TO HIGHLIGHT THE INEFFECTIVENESS OF HIS ASSISTANCE OF COUNSEL. THEREFORE, RES JUDICATA DOES NOT APPLY

First, it is crucial to emphasize that the Findings of Fact, Conclusions of Law, and Order ("FFCL") that the State cites as evidence of Mr. Powell's knowing and voluntary entry of his guilty plea actually pertain to Mr. Pinkey's acknowledgment of the guilty plea, not Mr. Powell's. Specifically, the "Petitioner" who was canvassed in the referenced proceeding was Mr. Pinkey not Mr. Powell. See (JA, III; APP000469-APP000474). While the State may assert that Mr. Pinkey knowingly and voluntarily entered his guilty plea, the same cannot be asserted for Mr. Powell based on the plain language of the FFCL.

Notwithstanding this confusing error, even if this Court were to determine that the FFCL indeed pertains to Mr. Powell, it would not invoke res judicata in barring his claim. Any assertion that Mr. Powell did not knowingly and voluntarily enter into the guilty plea agreement is once again connected to the ineffective assistance of counsel that Mr. Powell received. Mr. Powell's intent is not to rehash previously litigated issues, but rather to include his lack of full comprehension of the plea due to the subpar assistance he received from counsel. This assistance, which failed to meet the objective standard of reasonableness, creates a reasonable likelihood that, had it not been for counsel's erroneous advice, Mr. Powell would

not have entered a guilty plea. *Id.*; *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985).

Mr. Powell placed his trust in his attorney with the expectation of receiving sound and, at a minimum, reasonable legal guidance. Regrettably, the critical decision to enter a guilty plea was marred by the influence of ineffective counsel whose advice significantly skewed Mr. Powell's judgment to his detriment. The cornerstone of the attorney-client relationship is built upon the client's reliance on their legal counsel for accurate and well-founded advice. In Mr. Powell's case, this trust was betrayed by counsel whose guidance was not only flawed but also had a detrimental impact on Mr. Powell's ultimate decision.

CONCLUSION

Based upon the arguments set forth herein, and within Appellant's Opening Brief, Adrian Powell respectfully petitions this Court to reverse the district court's denial of the Petition, and remand this matter to the lower court.

DATED this 21st day of September 2023.

Respectfully Submitted:
SGRO & ROGER

Colleen Savage
COLLEEN N. SAVAGE, ESQ.
Nevada Bar No. 14947
Attorney for Adrian Powell

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Edition in Times New Roman 14 point font; or

[] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. This brief exceeds the 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 8,688 words; or

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[X] Does not exceed 15 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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of September, 2023.

Colleen Savage
COLLEEN N. SAVAGE, ESQ.
Nevada Bar No. 14947
2901 El Camino Ave., Suite 204
Las Vegas, NV 89102
csavage@sgroandroger.com
Attorney for Adrian Powell

CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on the 21st of September, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD, ESQ.
Nevada Attorney General

TALEEN R. PANDUKHT, ESQ.
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

ADRIAN POWELL, #1217413
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89070-0208

/s/ Richard Chavez
An Employee of Sgro & Roger