No. 86406

IN THE NEVADA SUPREME COURT

Troy White,

Appellant,

v.

State of Nevada, et al.,

Respondents.

On Appeal from the Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District, Clark County (CR A-22-859004-W)
Honorable Bita Yeager, District Court Judge

Petitioner-Appellant's Opening Brief

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NEV. RULE. APP. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Laura Barrera
2. Jonathan Kirshbaum
3. Christopher Oram
4. Jesse Folkestad
5. Scott Coffee
6. David Lopez Negrete

/s/ Laura Barrera
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JURISDICTIONAL STATEMENT

This is an appeal from the final order denying Troy White's petition for writ of habeas corpus filed September 27, 2022.[1] The court filed the Notice of Entry of Findings of Fact, Conclusions of Law and Order on March 16, 2023.[2] Troy White timely filed a notice of appeal on April 12, 2023.

This Court has jurisdiction under NEV. REV. STAT. § 34.575.

ROUTING STATEMENT

Under Nev. R. App. P. 17(b)(1), this case is not presumptively assigned to the Court of Appeals because it involves convictions of Category A and B felonies. Additionally, White argues, in part, that the Nevada Supreme Court should revisit and overrule its precedent in *Brown v. McDaniel*, 130 Nev. 565 (2014); therefore, White requests that the Nevada Supreme Court retain the case.[3]

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[1] X.App.1828-1848.

[2] X.App.1888-1899.

[3] This Court previously denied a request to consolidate this matter with case nos. 85519, 85881, & 86366, but indicated the appeals would be "clustered to ensure that they are resolved in a consistent and efficient manner."

STATEMENT OF THE ISSUES

1. Whether the Court should overrule *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014), and find post-conviction counsel's ineffectiveness can serve as good cause to overcome the procedural bars to White's petition.
2. Whether White received ineffective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. State Trial Court Proceedings

Troy White shot and killed his wife, Echo Lucas, on July 27, 2012, in the heat of passion. He also shot Lucas's lover and White's former close friend, Joseph Averman, who survived.[4] On December 11, 2012, White was charged in a criminal complaint with burglary while in the possession of a firearm, murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, carrying a concealed firearm, and multiple counts of child abuse, neglect, or endangerment because White's children were home at the time of the shooting. After a preliminary hearing held on December 12, 2012, the State filed an Information on December 27, 2012, charging White with the same counts listed in the amended complaint, except only one child abuse count per child.[5]

After a successful pretrial writ challenging the burglary charge because White was in his own home, *State v. White*, 330 P.3d 482 (Nev. 2014), White proceeded to trial on the remaining counts in April 2015.

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[4] *See, e.g.*, VIII.App.1493-1524; I.App.06.

[5] I.App.01.

White was represented by Scott Coffee and David Lopez-Negrete. The trial lasted for seven days. The State argued White acted with premeditation and deliberation. The defense countered that the State could only prove voluntary manslaughter. The key issue was the presence of a sufficient provocation for manslaughter instead of malice required for a murder conviction. *See* Nev. Rev. Stat. §§ 200.040, 200.050, 200.060.

On April 17, 2015, the jury found White guilty of second-degree murder and guilty on the remaining counts.[6] On July 20, 2015, the court sentenced White to ten years to life on the murder count with a consecutive term of seventy-six to one hundred and ninety-two months for the weapon enhancement; seventy-six to one hundred and ninety-two months on the attempted murder count with a consecutive and equivalent term for the weapon enhancement, consecutive to the murder count; a concurrent nineteen to forty-eight months on the concealed weapon count; and twenty-four to sixty months on each child abuse count with one count running consecutively to the other counts, and the rest

[6] VIII.App.1558.

running concurrently.[7] This is a total of thirty-one years to life imprisonment.[8] Judgment was entered on July 24, 2015.[9]

B. Direct Appeal

White timely appealed the judgment of conviction. The Nevada Supreme Court docketed the appeal as case number 68632. One of the claims raised by the defense was that the court erred in failing to instruct that the provocation causing heat of passion can take place over a period. The Nevada Supreme Court issued its Order of Affirmance on April 26, 2017. *See White v. State*, No. 68632. The court ruled there was no basis in Nevada law for a prolonged provocation instruction. *Id.* Remittitur was issued on May 22, 2017. *Id.*

C. State Post-Conviction Proceedings

White's timely petition for post-conviction relief was filed on April 24, 2018, by Jesse Folkestad of Christopher Oram's office.[10] Oram raised

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[7] VIII.App.1582.

[8] The judgment of conviction erroneously listed the aggregate term as thirty-four years to life. An amended judgment was later filed on February 5, 2016, removing the aggregation language.

[9] VIII.App.1582.

[10] VIII.App.1585.

six claims of ineffective assistance of counsel, and one claim of cumulative error.[11] None of the claims raised questioned trial counsel's failure to make a viable argument for voluntary manslaughter even though the defense at trial was to argue for a conviction of voluntary manslaughter in lieu of murder. The petition was denied on April 13, 2021.[12] Notice of entry was filed on April 15, 2021.[13]

Oram timely appealed and raised the same issues presented to the district court. *See White v. State*, No. 82798-COA. The Nevada Court of Appeals affirmed the district court's denial of White's post-conviction petition on February 3, 2022. *Id.* Remittitur issued on February 28, 2022.

D. Instant State Post-Conviction Proceedings

White filed a second/successive petition for post-conviction writ of habeas corpus on September 27, 2022.[14] In his petition he raised one claim of ineffective assistance of trial counsel based on trial counsel's failure to present a legally and factually viable argument to support the

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[11] VIII.App.1585; VIII.App.1593-1624.

[12] IX.App.1770-1794.

[13] IX.App.1795.

[14] X.App.1828-1848.

defense theory that White was guilty of only voluntary manslaughter, not first or second-degree murder.[15] White argued that he had good cause to overcome the procedural bars to this petition due to his post-conviction counsel's ineffectiveness.

On March 16, 2023, the district court denied the petition on procedural grounds, finding that the petition was procedurally barred, and that White could not establish good cause to overcome the procedural default.[16] In denying the petition, the court relied on this Court's decision in *Brown v. McDaniel*, 130 Nev. 565 (2014) to hold that ineffectiveness of post-conviction counsel in a non-capital case may not constitute good cause. *Id.* at 569. The court did not reach the issue of prejudice to White due to the finding that White could not establish good cause to overcome the procedural bars.[17] Notice of entry was issued on March 20, 2023.[18] White filed a timely notice of appeal on April 12, 2023.

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[15] X.App.1828-1848.

[16] X.App.1888-1899.

[17] X.App.1897.

[18] X.App.1900.

STATEMENT OF THE FACTS

A. The Evidence at Trial Supported a Theory of Voluntary Manslaughter under Nevada Law

In the months leading up to the shooting, White and Lucas were going through marital problems. This led to a separation in the summer of 2012.[19] Despite the separation, White continued to support his family and paid the mortgage on the family home.[20] He also paid the family's bills. Lucas did not work.[21] The couple had five children together.[22] During the separation, the children stayed at the house, with the parents moving in and out. Lucas stayed at the house during the week, and White stayed on weekends.[23]

Unbeknownst to White, his wife had started a romantic relationship with Averman in early 2012.[24] Averman and White met

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[19] VI.App.1036-1038.

[20] VI.App.1074-1075.

[21] V.App.903-904.

[22] *See e.g.,* IV.App.540. Lucas brought two children to the relationship, and the couple had three more. The elder children referred to White as their father, and White treated them as his own. (*See* VI.App.1101.)

[23] VI.App.1041.

[24] VI.App.1038-1039; VII.App.1367.

more than a decade earlier while the two were attending the Potter's House Church.[25] White and Averman quickly became close friends.[26] Averman was much younger than White.[27] He was in the Army National Guard and had talked to White about his military training.[28] Averman got divorced in April 2012.[29] Before Averman's divorce, Averman and his wife spent a great deal of time with Lucas and White.[30] Eventually White became aware of the relationship between his longtime friend and his wife, and the Whites separated.[31]

Shortly after the separation, Averman began staying the night at the White family home.[32] White was understandably upset about the situation, but when Lucas and Averman started looking for a new place to live, White convinced them not to. He thought it would be easier for

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[25] VI.App.1030.

[26] VI.App.1032.

[27] VI.App.1081.

[28] VI.App.1083-1084.

[29] VI.App.1031.

[30] VI.App.1033.

[31] *See, e.g.*, VI.App.1068; VII.App.1360.

[32] VI.App.1039-1040.

the children if they stayed at the house.[33] Averman quit his job after beginning his relationship with Lucas.[34] Because neither Lucas nor Averman were employed, White was responsible for all of the expenses.[35] During the week, White bunked on an air mattress in the living room of a friend from the Potter's House Church, Herman Allen.[36]

Facebook messages in the weeks leading up to the shooting reveal White's displeasure and frustration with the situation.[37] Witnesses agreed, however, that he desperately wanted his family back.[38] Then, in the days leading up the shooting, there was hope. Texts between White and Lucas reveal that they discussed reconciliation. Four days before the shooting, Lucas texted White pictures of their children and broken hearts. She asked him to talk to her.[39] The next day, Tuesday, she asked

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[33] VI.App.1042-1043.

[34] VI.App.132.

[35] V.App.903-904.

[36] VI.App.1152-1153.

[37] II.App.277-282.

[38] VI.App.1069, 1157; VII.App.1218.

[39] I.App.35.

him to talk with her the following day.[40] Later texts make clear the two talked on the Wednesday before the Friday shooting.[41] It is clear from later messages that Lucas promised White reconciliation with the family he wanted so desperately.[42] Allen testified White told him he wanted to reunite with Lucas and it was promising that they would.[43] The night before the shooting, White also wrote to a friend on Facebook that Lucas had told him the day before that she wanted their marriage and family back. He conveyed that he also wanted to get back together. Lucas, however, asked for more time before this could happen.[44] The text messages between White and Lucas also make it clear that Lucas was not moving quickly enough to remove Averman from their lives so that they could return to being a family, causing White frustration.[45]

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[40] I.App.35.

[41] I.App.33.

[42] I.App.33.

[43] VI.App.1157.

[44] II.App.282.

[45] I.App.20-41.

The day before the shooting, White texted Lucas, "Sorry. Love you. Jus[t] want us back."[46] She responded, "You don't know her like I do. It's a country song kinda reminds me of us. Have u heard it[?]"[47] Later, he wrote, "I wish you wanted to be together this weekend. Goodbye [E]cho until you finally make a decision. Hopefully after today you still want all y[o]u said u did yesterday. Its still here waiting for you. I love you."[48] He then asked her to go out with him that weekend, but she said she could not because she was busy.[49] He wrote, "I love you," then "Hopefully," and "Goodnight" at about 5:00 p.m.[50]

White continued to reach out to Lucas throughout the night while she was up braiding her hair and the next morning.[51] He expressed hope she still wanted to reconcile, like she had told him, but consternation that she requested more time with Averman first.[52] The messages over time

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[46] I.App.33.

[47] I.App.33.

[48] I.App.33.

[49] I.App.32.

[50] I.App.32.

[51] *See* I.App.20-32; VI.App.1044-1045.

[52] I.App.30-31.

shifted between anger and expressions of love. He urged her to stop delaying their reconciliation.[53] For example, White wrote:

> Please call me w[h]en you can. I wanna gv u my heart. I love you echo sweetie. Please please stop seeing him if you want us back. Please you have to. Please. It will never work if you wont let him go…please. please I am beggin you. For 1 last time. I'm being totally honest. I can't handle this anymore. Honestly. I'm asking u to please stop seeing him. Immediately. If u want me back this is it. I can't keep doin this. I'm going insane. I love you soooooo much.[54]

After growing frustration that Lucas would not speak to him and promise to leave Averman right away,[55] White told Lucas he would come over to the house to meet with Averman.[56] White's anger escalated,[57] but then his tone shifted, and he asked, "Do you still want back so since you talked about on Wednesday" [sic].[58] He explained that his vitriol came from his frustration that Lucas was delaying their reconciliation.[59]

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[53] I.App.27-30.

[54] I.App.27-28.

[55] I.App.23-27.

[56] I.App.23.

[57] I.App.20-23.

[58] I.App.20.

[59] I.App.20.

The shooting occurred that day, on Friday. White's boss testified that during this period, White was coming into work at about 3:00 or 4:00 in the morning because he was having trouble sleeping.[60] His usual shift started at 5:00 a.m.[61] White would routinely come to the family home on Friday afternoon to take care of the children for the weekend.[62] Allen, with whom White was living during the week, explained that White would leave for work on Friday morning and not return to Allen's home until Sunday evening.[63] Usually, White would get to the family home around 3:00 or 4:00 p.m. on Fridays.[64] On the day of the shooting, he arrived shortly before noon.[65] That morning, White went to work early and so left early.[66] White and his wife shared a single vehicle, which was left at the house for use in caring for the children.[67] During the week,

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[60] V.App.934-935.

[61] V.App.934.

[62] VI.App.1041, 1050.

[63] VI.App.1151.

[64] VI.App.1050.

[65] VI.App.1048.

[66] V.App.936.

[67] VI.App.1041-1042.

White was without a car and ether had to walk to the family home or take the bus.[68] That morning, White took a bus to his home.[69]

Averman and two of White's children testified about the events of that day. White was not agitated when he arrived.[70] White asked Lucas to speak with him, and she told him to return later. White then asked Averman if he and Lucas could have five minutes alone, and they went into a back bedroom.[71] Averman went into the master bedroom.[72]

At first, everything was quiet. Then, Averman testified he heard Lucas say, "Troy, no, just stop."[73] One son testified that he heard raised voices in the back bedroom.[74] The second son testified he heard Lucas say, "No, please stop, I won't go with Joe again."[75] The shots happened

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[68] VI.App.1087.

[69] V.App.837.

[70] III.App.501; IV.App.580; VI.App.1077.

[71] VI.App.1050-1051.

[72] VI.App.1052.

[73] VI.App.1053.

[74] III.App.502.

[75] IV.App.570.

quickly afterward.[76] Averman testified that White's demeanor at the time of the shooting had completely changed. He was upset and "to some extent irrational."[77] Only seconds passed between Lucas being shot and Averman being shot.[78] The whole incident was over in a matter of a few seconds.[79]

After the shooting, Averman described White as confused, going in and out of the room Averman was in.[80] White tried to usher his children into a bedroom so they would not see what had happened.[81] White took a cell phone from Averman but initially had problems placing a call to 911.[82] Averman heard White saying he could not get the phone to work.[83] At approximately 11:50 a.m., the oldest child called 911.[84] White was able

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[76] IV.App.585.

[77] VI.App.1095-1096.

[78] VI.App.1058.

[79] VI.App.1058.

[80] VI.App.1096.

[81] III.App.503; VI.App.1060.

[82] VI.App.1072.

[83] VI.App.1072.

[84] VII.App.1199.

to call 911 and ask for medical services about three minutes later.[85] The sirens could be heard very quickly thereafter.[86] A neighbor testified that he saw White come out of the house hysterical and desperate. He then got into the car in the driveway.[87]

White left and drove to Prescott, Arizona, birthplace of the Potter's House Church.[88] During the drive to Arizona, White called Allen and told him what had happened.[89] Having previously heard about the shooting, Allen had been trying to call White and was worried that White would commit suicide.[90] When Allen told White that Lucas had died and Averman was in the hospital, White broke down in tears.[91] He had previously asked how Lucas and Averman were doing.[92] Allen described

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[85] VII.App.1199.

[86] VI.App.1073.

[87] IV.App.676, 683.

[88] V.App.832.

[89] VI.App.1163-1165.

[90] VI.App.1162, 1176-1177.

[91] VI.App.1166-1167.

[92] VI.App.1166.

White as confused during their conversations.[93]

In Prescott, a crying White turned himself in without incident.[94] It had been only a few hours since the shooting.[95] White told the police in Prescott, "She needs help. We need to do something. She needs help."[96] He then started to cry and asked to see a counselor or psychiatrist.[97] He was taken into custody.[98]

B. Defense Counsel Presented Legally and Factually Unsupported Arguments for Voluntary Manslaughter

Because the defense theory was that the State could only prove voluntary manslaughter and not first or second-degree murder, the dispositive issue of the trial was whether the shooting was the result of an adequate provocation as opposed to malice.[99] The defense requested a jury instruction saying the provocation "can occur over either a long or

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[93] VI.App.1177-1178.

[94] IV.App.730, 737.

[95] V.App.831-832.

[96] IV.App.737.

[97] IV.App.737.

[98] IV.App.734.

[99] *See e.g.,* VIII.App.1512-1523.

short period of time and may be the result of an ongoing series of events."[100] Defense counsel acknowledged there were no Nevada cases supporting the request.[101] In fact, Nevada law foreclosed the concept of prolonged provocation. *See* Nev. Rev. Stat. § 200.060 ("[I]f there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder."). The court rejected the instruction.[102]

The defense therefore needed to identify a specific provocation and argue the State had not disproven it beyond a reasonable doubt. The defense argued that White went to the house the day of the shooting to kick Averman out of the home so that he and Lucas could reconcile.[103] Lucas tried to stop White, and the three ended up in the hallway.[104]

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[100] VIII.App.1443.

[101] VIII.App.1443.

[102] VIII.App.1444. Defense counsel, who also served as appellate counsel, continued to pursue this theory on appeal. It was likewise rejected by this Court. (*See White v. State*, No. 68632.)

[103] *See e.g.,* VIII.App.1521.

[104] VIII.App.1522.

Counsel then identified the provoking incident: "When Averman decides to interject himself into the conversation and he sees Averman coming out the door that is a highly provoking injury, that is a injury of the most highly provoking type. . . . It's the first time he's seen Joe since the betrayal."[105]

The defense offered no theory as to what happened in the room between White and Lucas that would have prompted such an extreme reaction such that the jury would have reasonable doubt White acted with malice. The State took advantage of this gap in the defense theory

> So I have to ask you something. What set Troy White off on July 27th, 2012? Do you have any idea? Do you have any idea what was said or done inside that room just before he pulled out that gun and shot and killed Echo Lucas? . . . You don't know what the provoking event is.[106]

Then in rebuttal the prosecution argued:

> That's not sudden heat of passion. They'd been separated for months, he'd known about Joe since early June, Joe moved in in late June. His text messages will show you that he knew when Joe was over at that house. This wasn't a secret then. And he wasn't surprised to find Joe at that house

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[105] VIII.App.1522-1523.

[106] VIII.App.1476.

> that morning. That's also abundantly clear from the text messages leading up to the murder. "I know Joe's there. Why won't you just send him away so we can talk." He knew what he was going to find when he went to that house.[107]

The defense failed to provide an answer to the question of what "set Troy White off" and what happened between White and Lucas. Some of that evidence was already before the jury. White was not agitated when he arrived at the house.[108] When he and Lucas went to speak in a bedroom, their voices were not raised.[109] Then, one of White's children testified he heard Lucas say, "No, please stop, I won't go with Joe again" and that the shots happened quickly afterward.[110] The State even recognized this evidence:

> As for the conversation that took place in the bedroom, it wasn't about moving Joe out of the house, it was about the defendant wanting her back and her not being willing to go back. [One son] told you what he heard—the only things he

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[107] VIII.App.1535.

[108] III.App.501; VI.App.1077.

[109] III.App.502.

[110] IV.App.570, 585.

> heard from that conversation were, no, Troy, please don't, fine, I'll stop seeing Joe.[111]

The evidence suggested that the provoking incident was not just White seeing Averman in the hallway, but Lucas rejecting White after telling him he could get his marriage and his family back. After the emotional turmoil of the previous few days and the hope Lucas had dangled in front of White, when confronted with the true end of his family and faced with the two people who robbed him of his chance at future happiness, he acted in response to "an irresistible passion."

In the second postconviction petition, White showed that the defense counsel had access to even more evidence to support this theory. In a declaration from White, he confirms what the other evidence showed. The Wednesday before the shooting, he and Lucas discussed reconciliation, and it was his understanding that they would get back together that weekend.[112] On Thursday night, Lucas still had not told him she had kicked Averman out of the house.[113] White was upset that

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[111] VIII.App.1536.

[112] X.App.1821.

[113] X.App.1821.

Averman was still at his home, and he had had enough of it. He decided that if he and Lucas were going to get back together that weekend, there was no need to wait. He decided to kick Averman out himself.[114] He brought the gun because he was worried Averman would start a physical confrontation, and he wanted to be able to brandish it. Averman was fifteen years younger and stronger. White knew Averman was in the Army Reserves and had military training. White felt threatened and so misguidedly brought the gun to try to hold Averman at bay.[115]

When White and Lucas were alone in the bedroom, White told her she had to make a final decision between him and Averman. Lucas chose Averman.[116] What happened next is "jumbled" for White. He remembers only snippets.[117] For example, he remembers turning Lucas over after she was shot and feeling like he was seeing it from outside of his body. He could see himself looking at her.[118] He remembers being confused about

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[114] X.App.1821.

[115] X.App.1821.

[116] X.App.1822.

[117] X.App.1822.

[118] X.App.1822.

what had happened and feeling like everything happened quickly.[119] He remembers feeling "off"; the closest feeling he can liken it to is as if he had not gotten enough sleep. He felt like there was no "top of [his] head and [he] was floating in the moment."[120] He felt something "deep inside [him] break."[121] When White left the house, after calling 911 and trying to shield the children from what he had done, he did not know what had happened.[122] He went on autopilot and just started driving.[123]

In White's second postconviction petition, which underlies this appeal, White argued trial counsel was ineffective because defense counsel had a constitutional obligation to not present a legally untenable defense, particularly when a valid defense was available.[124] White further claims that defense counsel's failure undermines the reliability of the verdict, and that the reliability of the verdict was further

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[119] X.App.1822.

[120] X.App.1822.

[121] X.App.1822.

[122] X.App.1822.

[123] X.App.1822.

[124] X.App.1833-1845.

undermined when the State took advantage of defense counsels' ineffectiveness, by using their untenable legal theory to impermissibly shift the burden to the defense.[125] *See Crawford v. State*, 121 P.3d 582, 587 (Nev. 2005) (the State had the burden of proving lack of provocation). The district court concluded this claim was procedurally barred and rejected White's argument for good cause based on ineffective assistance of postconviction counsel, relying on *Brown v. McDaniel*, 130 Nev. 565 (2015).[126]

SUMMARY OF THE ARGUMENT

White's petition was dismissed by the district court as procedurally barred; however, White can establish good cause and prejudice to overcome procedural bars to his petition. In doing so, White argues that this Court should overrule its previous decision in *Brown v. McDaniel*, 130 Nev. 565 (2015), and conclude that ineffective assistance counsel of post-conviction counsel can represent good cause to overcome the procedural bars in Chapter 34.

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[125] X.App.1833-1845.

[126] X.App.1888-1898.

White shows good cause due to the ineffective assistance of his post-conviction counsel in his initial state habeas proceedings. The issue in this case was whether there was adequate provocation to support a conviction of voluntary manslaughter instead of first or second-degree murder. It was plain from the record in this case that trial counsel first relied on a novel concept related to prolonged provocation that was not supported by Nevada law, then relied on a theory of provocation that was not supported by the facts of the case. While in some circumstances arguing a novel legal concept may be appropriate, it was not in this case. This is because the facts of the case easily supported a theory of provocation that was viable under Nevada law and bolstered by the evidence. Had trial counsel argued a viable theory of provocation, it is likely that White would have been convicted of voluntary manslaughter rather than second-degree murder, and accordingly, that he would not have been convicted of attempted murder. Because trial counsel's ineffectiveness was plain in the record, it was ineffective for post-conviction counsel to fail to bring this claim.

Furthermore, White also demonstrates prejudice because the ineffective assistance of trial counsel claim is meritorious. As stated

above, the evidence supported a theory of provocation and voluntary manslaughter. In fact, it was the strategy of White's defense counsel to argue for a conviction of voluntary manslaughter rather than first or second-degree murder. However, counsel failed to present a legally and factually sound theory of provocation in spite of favorable evidence. The record reflects that, had this theory been presented, there is a reasonable probability at least one juror would have chosen voluntary manslaughter for the murder charge, and chosen not to convict on the charge of attempted murder.

This Court should overrule *Brown*, find that White established cause and prejudice, and grant the writ. In the alternative, this Court should overrule *Brown* and remand to the lower court for further findings with regards to cause and prejudice in light of that ruling.

ARGUMENT

I. This Court should overrule *Brown v. McDaniel* and find that White establishes good cause to overcome the procedural bars to his petition.[127]

To overcome the one-year, successive petition procedural bars of NRS 34.726 and 34.810, White must demonstrate (1) good cause for the delay in bringing his new claim, as well as (2) actual prejudice. NRS 34.726(1); NRS 34.810(3).

To show good cause, White can demonstrate "an impediment external to the defense" prevented him from raising his claims earlier. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (*citing Harris v. Warden*, 114 Nev. 956, 959–60 & n. 4, 964 P.2d 785, 787–88 & n. 4 (1998)). "An impediment external to the defense may be demonstrated by 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.'"); *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (*quoting Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (citations and quotations omitted)).

To show actual prejudice, White must demonstrate the claim is meritorious, and if properly considered, White would prevail. *See Hogan*

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[127] In addition to showing good cause to overcome the procedural bars based on ineffective assistance of post-conviction counsel, White notes that his second postconviction petition was filed within one year of remittitur on his first petition.

v. Warden, 24 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) ("not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions," *quoting United States v. Frady*. 456 U.S. 152, 170, (1982)).

A. This Court should overrule *Brown v. McDaniel.*

White demonstrates good cause to overcome the procedural bars to Ground One because his prior post-conviction counsel was ineffective for failing to raise this claim in his initial petition; however, this Court, in *Brown v. McDaniel,* 130 Nev. 565, 331 P.3d 867 (2014), refused to recognize ineffective assistance of post-conviction counsel as good cause to overcome the procedural bar in non-capital cases. With all due respect, this Court's decision in *Brown* was wrongly decided. The time is ripe for the Court to reconsider *Brown* now that the U.S. Supreme Court has limited *Martinez* in the recent decision of *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022),

The decision in *Brown* stems in part from the U.S. Supreme Court's decision in *Martinez v. Ryan,* 566 U.S. 1 (2012). In federal habeas proceedings, if a petitioner procedurally defaults a claim of ineffective assistance of trial counsel, the petitioner may be able to show good cause

to overcome the default if the petitioner had inadequate assistance from initial state post-conviction counsel. In order to make this good cause argument, a petitioner needs to show initial review post-conviction counsel was ineffective within the meaning of *Strickland v. Washington,* 466 U.S. 668 (1984), for failing to raise the relevant trial-counsel-ineffectiveness claim. That is, the petitioner must establish post-conviction counsel performed deficiently by failing to raise the claim, and the petitioner must also eventually prove the merits of the underlying trial-counsel-ineffectiveness claim.

The U.S. Supreme Court's decision in *Martinez* was a correct interpretation of the equitable principles governing procedural default under federal law. As the *Martinez* opinion explains, when a petitioner has a winning trial-counsel-ineffectiveness claim, state courts need to have a process for the petitioner to raise that claim. 566 U.S. at 10-11. But if the petitioner does not receive adequate assistance from state post-conviction counsel, there is a risk that "no court will review" the petitioner's winning claim. *Id.* at 11. The problem is especially acute because "[w]ithout the help of an adequate attorney, a prisoner will have . . . difficulties vindicating a substantial ineffective-assistance-of-trial-

counsel claim." *Id.* After all, ineffective assistance of counsel claims "often require investigative work," "an understanding of trial strategy," and the development of "evidence outside the trial record," all of which requires "an effective attorney." *Id.* at 11-12. For these reasons, the federal courts allow a petitioner to show cause to avoid the default of a trial-counsel-ineffectiveness claim when the petitioner did not receive adequate assistance from a state post-conviction attorney.

In *Shinn v. Ramirez*, however, the U.S. Supreme Court recently held a federal court is precluded under most circumstances from considering new evidence beyond the state court record to support a procedurally defaulted claim on the merits. 142 S. Ct. at 1735. In other words, a prisoner can raise new ineffective-trial-counsel claims in a federal habeas petition, but the prisoner can't rely on new evidence.

Under the new rules, prisoners who suffered constitutional violations would hit a dead end. *Martinez* previously provided a window of opportunity for prisoners to raise meritorious ineffective-trial-counsel claims in federal court, even if the state court refused to consider them. But under *Shinn* and *Brown*, if a Nevada prisoner's trial counsel was ineffective, the prisoner would never have the opportunity to raise this

claim or develop an evidentiary record if the prisoner lacked effective post-conviction counsel—no Nevada state nor federal court would ever consider whether the prisoner's right to effective trial counsel was violated.

A prisoner should not bear the burden of lacking effective post-conviction counsel. The *Martinez* opinion recognizes the unrealistic expectation of a state prisoner to understand, much less develop the factual basis for, a winning trial-counsel-ineffectiveness claim. 566 U.S. at 11-12. Because prisoners need an effective post-conviction attorney to raise these claims, Nevada unfairly penalizes a petitioner for failing to raise a winning trial-counsel-ineffectiveness claim in an initial state post-conviction petition.

The *Brown* Court found the *Martinez* decision unpersuasive, but the reasoning in *Brown* is questionable, and the Court should reconsider its previous analysis. First, the *Brown* Court distinguished *Martinez* by noting there is no constitutional right to counsel in post-conviction proceedings, but whether a state prisoner has a right to post-conviction counsel is irrelevant to whether a state prisoner can show cause to overcome the state procedural bars. *Brown,* 130 Nev. at 571, 331 P.3d at

871. Indeed, a petitioner can show cause for various reasons that do not implicate constitutional rights, such as being held in administrative segregation or not receiving mail. Second, the *Brown* opinion noted the *Martinez* decision interpreted federal procedural rules, not state procedural rules, and did not require states to appoint counsel for non-capital petitioners. *Id.*, 130 Nev. at 571, 331 P.3d at 871-72. But while *Martinez* isn't binding in Nevada, it is persuasive authority from the U.S. Supreme Court, and this Court should give its reasoning due regard. Third, the *Brown* Court noted the relevant statues contemplate a petitioner will file a single post-conviction petition. *Id.*, 130 Nev. at 572-73, 331 P.3d at 872-73. But the statutes already provide exceptions to allow untimely or successive petitions when a petitioner can show cause, so allowing a claim of ineffective assistance of post-conviction counsel would not break barriers in untimely or successive petitions. NRS 34.726(1); NRS 34.810(1).

In short, the U.S. Supreme Court's decision in *Martinez* is persuasive, and this Court's rejection of its principles in *Brown* is ripe for reconsideration after the U.S. Supreme Court's decision in *Shinn*. Indeed, other State courts have begun to reconsider their post-conviction review

procedures in light of *Shinn*. *See Frost v. State*, 514 P.3d 1182, 1188 n.6 (Or. 2022) (granting relief in part because the recent *Shinn* decision indicates State review of the errors of petitioner's state post-conviction counsel is likely the end of the line); *Commonwealth v. Debois*, 281 A.3d 1062 (Pa. Super. Ct. 2022) (reversing a dismissal, in part because, "An affirmance in this instance would effectively close off any avenue for additional state-post conviction collateral review. That result would forever cut off any opportunity for Appellant to create an evidentiary record for his ineffective claims in light of *Shinn*."). This Court should overrule *Brown* and allow non-capital petitioners like White to argue good cause to overcome procedural bar based on the ineffective assistance of state post-conviction counsel.

B. If this Court overrules *Brown v. McDaniel*, White demonstrates good cause and prejudice to overcome the procedural bars to this petition.

1. White establishes good cause because his post-conviction counsel was ineffective for failing to raise Ground One.

In the instant petition, White raises one claim that his post-conviction counsel, Christopher Oram, failed to raise. In Ground One, White argues his trial counsel was ineffective for failing to properly argue

for voluntary manslaughter. The evidence in this case easily supported a theory of voluntary manslaughter. White's trial attorneys recognized this fact and premised their defense on the theory that the State could only prove voluntary manslaughter, not first or second-degree murder. However, the trial attorneys undermined their own defense by presenting a case for voluntary manslaughter that was inadequate and not legally tenable. White's post-conviction counsel was ineffective because he failed to notice trial counsel's deficient voluntary manslaughter theory and raise a claim on this basis even though it pervades the entire defense presentation, as well as the appeal. In reviewing White's case, it should have been apparent to Oram that trial counsel's defense theory was inadequate because it contradicted Nevada law and left essential questions unanswered. As explained in Section 2 *infra*, this claim is meritorious because trial counsel was ineffective. Had Oram raised these claims, White could have demonstrated that trial counsel's ineffectiveness materially affected the outcome of his trial and sentence.

2. White demonstrates prejudice because Ground One has merit.

In Ground One, White argues his trial attorneys were ineffective for not properly arguing for voluntary manslaughter. At trial, the State argued White acted with premeditation and deliberation when he shot and killed his wife, Echo Lucas.[128] White's defense was that the State could only prove voluntary manslaughter. In Nevada, voluntary manslaughter requires "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing," Nev. Rev. Stat. § 200.050. "The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible." Nev. Rev. Stat. § 200.060; *see* Nev. Rev. Stat. § 200.040 (manslaughter is a voluntary killing "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible"). The key issue for the defense to focus on was the presence of a sufficient provocation to undermine a finding of malice, which is required for a murder conviction.

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[128] *See, e.g.*, VIII.App.1465-1493; I.App.1-9.

The facts at trial supported the defense's theory of voluntary manslaughter. Defense counsel, however, made a crucial mistake. They did not adequately identify the required provocation for voluntary manslaughter, thereby undermining their own theory. The jury returned a verdict of second-degree murder.

The evidence supported the theory of voluntary manslaughter and suggests that there was adequate provocation. Communication between White and Echo showed that White believed Echo was going to end her affair with Joe Averman, and that White was hopeful he was going to get his family back.[129] That was White's state of mind when he went to the house the day of the shooting. However, shortly after he arrived, his dream of having his family back was dashed when Echo told him she was choosing Averman over White and would not be ending the affair after all.[130] White recalls that at that point he entered a dissociative state, and his memory of the crime is jumbled.[131] It's clear that Echo's decision to stay with Averman was unexpected by White, and constituted

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[129] I.App.20-41; II.App.277-282; X.App.1837-1839.

[130] X.App.1822.

[131] X.App.1822.

provocation sufficient to support a theory of voluntary manslaughter.

Despite the existence of adequate provocation, defense counsel instead pursued an untenable legal theory for their voluntary manslaughter defense, that was unsupported by Nevada law. Defense counsel first attempted to pursue a theory of prolonged provocation, asking for a jury instruction stating that provocation can occur over a long or short period of time and can be the result of a series of events.[132] This prolonged-provocation theory was not supported by law and, in fact, is contrary to the concept of provocation in Nevada. *See* Nev. Rev. Stat. § 200.060 ("[I]f there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder"). Predictably, the court rejected the request for the instruction.[133]

White's trial attorneys needed to identify a specific provocation and argue that the State had not disproven it beyond a reasonable doubt.

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[132] VIII.App.1443.

[133] VIII.App.1444.

While the evidence supported a theory that Echo's sudden change of heart about reuniting with White was provocation, White's attorneys decided to argue that the provocation was based on Averman interjecting himself into the conversation between Echo and White when White was at the house.[134] The defense argument was that White was provoked by seeing Averman. This theory was internally inconsistent and had a gaping hole in it. According to this theory, White went to the house to kick out Averman, saw Averman when he arrived and calmly asked to speak to Lucas, but then was overcome by Averman's presence after he talked to Lucas.

That theory was not supported by the evidence and did not explain was why there was a shift. White had already seen Averman when he first arrived at the house and no conflict ensued at that point. Furthermore, it left open the question of what happened in the conversation between Echo and White immediately before he shot her.

[134] VIII.App.1522-1523.

The State took advantage of these gaps in the defense theory by commenting on them during closing arguments.[135]

White's attorneys performed deficiently by failing to raise the argument for provocation that was supported by the record; Echo's final and unexpected rejection of White caused him to snap. His actions that followed were not premeditated and deliberate, but the result of a sudden, violent impulse of passion. This was voluntary manslaughter, not second-degree murder. Looking beyond the evidence presented, White's trial attorneys could have discovered more support for this theory of provocation by speaking with White. His declaration, submitted with the petition below, confirms that the provoking incident was the conversation with Echo, and his expectation of reuniting with his family being upended.[136] Counsel performed deficiently by failing to present this cogent, comprehensive theory of voluntary manslaughter to the jury.

White was prejudiced by defense counsel's choice of theory. The jury found White guilty of second-degree murder because the defense had not

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[135] VIII.App.1476, 1535.

[136] X.App.1821-1822.

done enough to cast doubt on the State's argument for malice and to show that the State had not proven lack of provocation beyond a reasonable doubt.[137] Tellingly, during deliberations the jury sent a note saying, "we would like to hear what happened before and prior to the moment of the shooting."[138] In the same respect, White was also prejudiced with regards to his conviction for attempted murder of Averman. If the jury found White acted in the heat of passion in response to a sufficient provocation, then he could not have been guilty of attempted murder.[139] This is because attempted voluntary manslaughter is not a crime in Nevada. *Curry v. State*, 792 P.2d 396, 397 (Nev. 1990).

The record reflects that, had this theory been presented, there is a reasonable probability at least one juror would have chosen voluntary manslaughter for the murder charge, and chosen not to convict on the charge of attempted murder. Counsel was ineffective, and White is entitled to relief.

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[137] VIII.App.1558-1560.

[138] VIII.App.1547.

[139] VIII.App.1437.

CONCLUSION

The Court should overrule *Brown v. McDaniel*, 130 Nev. 565 (2015), find that White has shown cause and prejudice to overcome the procedural bars, and grant the writ.[140] In the alternative, this Court should overrule *Brown*, and remand with instructions to consider on the merits the claim presented in White's second postconviction petition, namely that trial counsel was ineffective due to counsel's failure to properly argue for voluntary manslaughter.

Dated September 13, 2023.

Respectfully submitted,

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/s/ Laura Barrera
Laura Barrera
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[140] The district court also held that White's claim was waived because it was not raised on direct appeal and that the petition was an abuse of writ. X.App.1893-1895. As to the first point, the court was wrong because this is a claim of ineffective assistance of counsel, and so could not be raised on direct appeal. *Corbin v. State*, 111 Nev. 378, 381 (1995). The court was also wrong on the second point. This is not an abuse of writ, because White shows good cause to excuse the procedural bars, and because the ground has merit. *See Lozada v. State*, 110 Nev. 349, 358 (1994).

CERTIFICATE OF COMPLIANCE

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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 September 13, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2023, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Alexander G. Chen, Jonathan VonBoskerck, and Aaron D. Ford.

I further certify that some of the participants in the case are not registered appellate electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

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