

No. 86406

IN THE NEVADA SUPREME COURT

Electronically Filed
Sep 13 2023 11:24 AM
Elizabeth A. Brown
Clerk of Supreme Court

Troy White,

Petitioner-Appellant,

v.

State of Nevada, et al.

Respondents-Appellees.

**Petitioner-Appellant's Appendix
Volume 10 of 10**

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District of Nevada
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Dated September 13, 2023.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Laura Barrera

Laura Barrera
Assistant Federal Public Defender

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:

Troy White #1143868 High Desert State Prison P.O. Box 650 Indian Springs, NV 89070	Jaime Stilz Deputy Attorney General Office of the Attorney General 100 N. Carson St. Carson City, NV 89701
--	--

/s/ Kaitlyn O'Hearn

An Employee of the Federal
Public Defender, District of
Nevada

Declaration of Troy White

I, Troy White, declare under penalty of perjury that the following is true and correct:

1. I am the petitioner for habeas corpus relief in case number 21-cv-01800.
2. I was the defendant in Nevada case C-12-286357-1. I was represented at trial by Scott Coffee and David Lopez-Negrete.
3. I was married to Echo Lucas. When we got married, she already had two small children, and we had three more together. I all of the children and viewed Echo's children as my own.
4. ~~Echo and I separated in June 2012.~~ ^{July} I learned she was having an affair with my close friend Joseph Averman.
5. During our separation, Echo stayed at our family house with the kids during the week. I came on Fridays and stayed with them over the weekend.
6. I learned that Joseph moved into my house with Echo and my children. Echo did not work, so I was paying all of the bills for the whole family. Joseph also stopped working.
7. On Wednesday, ~~April~~ ^{July} 25, 2012, Echo and I talked, and she told me we would get back together. She said we could reunite that weekend. I wanted my family back intact. I loved Echo, and so was eager to reconcile.
8. That Friday morning, the morning of ~~April~~ ^{July} 27, I went into work early because I could not sleep. I was having trouble sleeping because it was bugging me that Joseph was still at my house. I knew that Joseph usually stayed at my house with Echo, and she had not told me he was gone, so I assumed he was still there. Thinking about this was keeping me up.
9. After I finished my work, I went back to Herman Allen's apartment. He was a friend from church, and I had been bunking in his living room during the week since Echo and I separated.
10. I decided that if Echo and I were going to get back together that weekend, there was no reason to wait. I had had enough of Joseph staying in my home, so I decided to go there to kick him out.
11. Joseph was fifteen years younger than me. He was stronger than me. He was in the Army Reserves, but I remember he was trying to go to war overseas, so I knew he had to have military training. I was threatened by all of this, so I decided to bring a gun to kick Joseph out of the house. I thought I could brandish it in case he started a confrontation.

12. I took the bus from Herman's apartment to my house. Echo and I had one car, and it stayed at the house so that whoever was taking care of the kids could use the car.
13. When I got to the house, I asked to talk to Echo. We went to a bedroom that was used as a craft room.
14. I remember telling Echo that she had to choose between me and Joseph. She chose him. I remember opening the door to the craft room and kicking the door of the master bedroom. After that, things are jumbled in my memory.
15. I remember having the gun in my hand. I remember Echo yelling something. I remember seeing Joseph. I remember turning Echo over after she was shot and being confused about what had happened.
16. I felt like I was seeing events from not in my body. I could see the back of myself seeing Echo. I felt like everything happened so fast. I felt something deep inside me break.
17. At some point, my three older children come down the hallway. I knew I had to protect them, so I told them to go into their bedroom. I did not want them to see their mother like that.
18. Joseph said something to me about 911. I tried to use Echo's phone but did not know the password. I do ~~not~~^{TBW} remember whose phone I used to call 911. ^{TBW} I used my own phone.
19. I remember feeling off. It was like I had not gotten enough sleep. I felt like there was no top of my head and I was floating in the moment. I was aware something had happened and that I had done it, but things did not make sense.
20. I left the house and at that point did not know what had happened. My head felt bombarded with pictures of what had happened, but I did not understand it. I went on autopilot and started to drive without thinking about where I was going.
21. I do not remember specific conversations with my trial lawyers, but if they had asked me to give the details included in this declaration, I would have.

Troy White
Name (printed)

Troy White
Signature

Indian Springs, NV
City, State

05-25-22
Date



CASE NO: A-22-859004-W
Department 9

EXHS
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Attorney For Petitioner Troy White

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

Troy White,
Petitioner,
v.
State of Nevada,
Respondents.

Case No. _____
(C-12-286357-1)

Dept. No.

INDEX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF
HABEAS CORPUS (POST-CONVICTION)

Petitioner Troy White submits the following exhibits in support of his Petition for Writ of Habeas Corpus (Post-Conviction).

No.	Date	Document	Court	Case #
1.	04/06/2015	Trial Exhibit Indexes	Eighth Judicial District Court	C-12-286357-1
2.	04/06/2015	State's Exhibit 085 – Lantern Forensic Report: Messages	Eighth Judicial District Court	C-12-286357-1
3.	04/07/2015	State's Exhibit 086 – Facebook Status Updates	Eighth Judicial District Court	C-12-286357-1
4.	04/07/2015	State's Exhibit 087 – Facebook Message	Eighth Judicial District Court	C-12-286357-1
5.	04/07/2015	State's Exhibit 088 – Facebook Message	Eighth Judicial District Court	C-12-286357-1
6.	04/07/2015	State's Exhibit 089 – Facebook Message	Eighth Judicial District Court	C-12-286357-1
7.	04/07/2015	State's Exhibit 090 – Facebook Message	Eighth Judicial District Court	C-12-286357-1
8.	04/07/2015	State's Exhibit 091 –Facebook Message	Eighth Judicial District Court	C-12-286357-1
9.	04/16/2015	Court's Exhibit 017 – Communication re: Jury Instructions	Eighth Judicial District Court	C-12-286357-1
10.	04/17/2015	Court's Exhibit 037 – Note from Juror	Eighth Judicial District Court	C-12-286357-1
11.	05/25/2022	Declaration of Troy White	N/A	N/A

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Dated September 27, 2022.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

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AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this September 27, 2022.

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2022, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court’s electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Alexander Chen, Alexander.Chen@clarkcountyda.com, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered 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 people:

Troy White #1143868 Hish Desert State Prison P.O. Box 650 Indian Springs, NV 89070	Charles L. Finlayson Office of the Attorney General 100 North Carson Street Carson City, NV 89701-4717
Clark County District Attorney 200 Lewis Ave. Las Vegas, NV 89101	

/s/ Kaitlyn O'Hearn
An Employee of the Federal
Public Defender District of
Nevada



PWHC
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Nevada State Bar No. 11479
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(702) 388-6577
Jonathan_Kirshbaum@fd.org

CASE NO: A-22-859004-W
Department 9

Attorney for Petitioner Troy White

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Troy White,
Petitioner,
v.
State of Nevada,
Respondents.

Case No. _____
(C-12-286357-1)

Dept. No. XXVIII

**PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)**

1. Name of institution and county in which you are presently imprisoned
or where and how you are presently restrained of your liberty: High Desert State
Prison

2. Name and location of court which entered the judgment of conviction
under attack: 8th Judicial District Court, Clark County

3. Date of judgment of conviction: 7/24/2015; 2/5/2016 Amended Judgment
of Conviction

4. Case Number: C-12-286357-1

- 1 10. If you were found guilty after a plea of not guilty, was the finding made
2 by: (a) Jury X (b) Judge without a jury _____
- 3 11. Did you testify at the trial? Yes _____ No X
- 4 12. Did you appeal from the judgment of conviction? Yes X No _____
- 5 13. If you did appeal, answer the following:
- 6 (a) Name of Court: Nevada Supreme Court
- 7 (b) Case number or citation: 68632
- 8 (c) Result: 4/26/2017 Order of Affirmance
- 9 14. If you did not appeal, explain briefly why you did not: N/A
- 10 15. Other than a direct appeal from the judgment of conviction and
11 sentence, have you previously filed any petitions, applications or motions with respect
12 to this judgment in any court, state or federal? Yes X No _____
- 13 16. If your answer to No. 15 was “yes,” give the following information:
- 14 (a) (1) Name of Court: 8th Judicial District Court, Clark County
- 15 (2) Nature of proceeding: post-conviction habeas petition
- 16 (3) Ground raised:
- 17 I. Mr. White received ineffective assistance of trial counsel
18 for failure to properly investigate by failing to forensically
19 analyze Mr. White’s cell phone.
- 20 II. Mr. White received ineffective assistance of trial and
21 appellate counsel for failure to object to the State’s
22 insinuation of prior unknown acts of domestic violence
- 23 III. Mr. White received ineffective assistance of counsel based
24 on counsel’s failure to ensure the police obtained a warrant
25 to forensically analyze the phone attributed to Echo Lucas

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in violation of the Sixth, Fourth, and Fourteenth
Amendments to the United States Constitution.

IV. Mr. White received ineffective assistance of trial and
appellate counsel for failure to object and raise on appeal
improper prosecutorial argument.

V. Mr. White received ineffective assistance of trial and
appellate counsel for failure to object and raise on appeal
the district court's giving of instruction numbers 18 and 28
in violation of the Fifth and Fourteenth Amendment to the
United States Constitution.

VI. Mr. White is entitled to a reversal of his convictions based
upon cumulative error.

(4) Did you receive an evidentiary hearing on your petition,
application or motion? Yes X No

(5) Result: Denial

(6) Date of Result: 4/13/2021 Findings of Fact, Conclusions of Law
and Order; 4/15/2021 Notice of Entry of Order of Findings of
Fact, Conclusions of Law and Order

(7) If known, citations of any written opinion or date of orders
entered pursuant to such result: 2/3/2022 Nevada Court of
Appeals Order of Affirmance #82798

17. Has any ground being raised in this petition been previously presented
to this or any other court by way of petition for habeas corpus, motion, application or
any other post-conviction proceeding? Yes If so, identify:

a. Which of the grounds is the same: All grounds

1 b. The proceedings in which these grounds were raised: Federal
2 Habeas Corpus Petition

3 c. Briefly explain why you are again raising these grounds.
4

5 The ground raised in the petition has been presented to the federal court in
6 White's federal habeas corpus petition, but has not been previously presented to the
7 state court. Prior post-conviction counsel was ineffective for failing to raise this claim
8 in this petition.

9 Any factual dispute regarding the claim of good cause should be resolved via
10 an evidentiary hearing.
11

12 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any
13 additional pages you have attached, were not previously presented in any other court,
14 state or federal, list briefly what grounds were not so presented, and give your reasons
15 for not presenting them. (You must relate specific facts in response to this question.
16 Your response may be included on paper which is 8 ½ by 11 inches attached to the
17 petition. Your response may not exceed five handwritten or typewritten pages in
18 length.).

19 19. Are you filing this petition more than 1 year following the filing of the
20 judgment of conviction or the filing of a decision on direct appeal? YES If so, state
21 briefly the reasons for the delay. (You must relate specific facts in response to this
22 question. Your response may be included on paper which is 8 ½ by 11 inches attached
23 to the petition. Your response may not exceed five handwritten or typewritten pages
24 in length.)
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1 Prior post-conviction counsel was ineffective for failing to the claim in this
2 petition. This petition is being filed in a reasonable time as it is within one year of
3 remittitur on the appeal from the denial of petitioner's first postconviction petition.
4 Any factual dispute regarding the claim of good cause should be resolved via an
5 evidentiary hearing.

6 20. Do you have any petition or appeal now pending in any court, either
7 state or federal, as to the judgment under attack? Yes X No _____

8 If yes, state what court and the case number: U.S. District Court of
9 Nevada, Case No. 2:21-cv-01800-GMN-VCF

10 21. Give the name of each attorney who represented you in the proceeding
11 resulting in your conviction and on direct appeal: Scott Coffee and David Lopez-
12 Negrete / CCPD (trial and sentencing), Scott Coffee / CCPD (direct appeal);
13 Christopher Oram (post-conviction and post-conviction appeal)

14 22. Do you have any future sentences to serve after you complete the
15 sentence imposed by the judgment under attack: Yes ____ No X ____

16 23. State concisely every ground on which you claim that you are being held
17 unlawfully. Summarize briefly the facts supporting each ground. If necessary you
18 may attach pages stating additional grounds and facts supporting same.

19 20 **GROUND FOR RELIEF**

21 **Ground One: Troy White was denied his right under the Sixth and Fourteenth**
22 **Amendments to the United States Constitution to effective trial counsel.**

23 **Statement in Support of the Claim:**

24 Under the Sixth and Fourteenth Amendments to the United States
25 Constitution, a defendant has the right to the effective assistance of trial counsel. To
26 establish a claim of ineffective assistance of counsel, a petitioner must show that
27 counsel's performance was professionally unreasonable and that there "is a

1 reasonable probability that, but for the counsel’s unprofessional errors, the result of
2 the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668,
3 694 (1984). “A reasonable probability is a probability sufficient to undermine the
4 confidence in the outcome.” *Id.* White’s trial counsel, Scott Coffee and David
5 Lopez-Negrete, performed deficiently in multiple respects, giving rise to a reasonable
6 probability that the result of Mr. White’s proceedings would have been different if
7 not for counsels’ ineffectiveness.

8 **A. Trial counsel was ineffective for not properly arguing for voluntary**
9 **manslaughter.**

10 Troy White shot and killed his wife, Echo Lucas, in their family home. White
11 then shot her lover, Joe Averman. Averman survived. (*See, e.g.*, 4/16/15 Tr. at 68–99;
12 4/6/15 Second Am. Information.) The State argued White acted with premeditation
13 and deliberation. The defense countered that the State could only prove voluntary
14 manslaughter. In Nevada, voluntary manslaughter requires “a serious and highly
15 provoking injury inflicted upon the person killing, sufficient to excite an irresistible
16 passion in a reasonable person, or an attempt by the person killed to commit a serious
17 personal injury on the person killing,” Nev. Rev. Stat. § 200.050. “The killing must be
18 the result of that sudden, violent impulse of passion supposed to be irresistible.” Nev.
19 Rev. Stat. § 200.060; *see* Nev. Rev. Stat. § 200.040 (manslaughter is a voluntary
20 killing “upon a sudden heat of passion, caused by a provocation apparently sufficient
21 to make the passion irresistible”). The key issue for the defense to focus on, therefore,
22 was the presence of a sufficient provocation to undermine a finding of malice, which
23 is required for a murder conviction.

24 The facts at trial supported the defense’s theory of voluntary manslaughter.
25 Defense counsel, however, made a crucial mistake. They did not adequately identify
26 the required provocation for voluntary manslaughter. The defense theory was
27

1 therefore undermined, and the jury returned a verdict of second-degree murder. By
2 failing to offer a cohesive, legally supported defense, counsel rendered ineffective
3 assistance.

4 **1. The evidence presented at trial supported a theory of**
5 **voluntary manslaughter.**

6 In the months leading up to the shooting, White and Lucas were going through
7 marital problems. This led to a separation in the summer of 2012. (4/13/15 Tr. at 65–
8 67.) Despite the separation, White continued to support his family and paid the
9 mortgage on the family home. (*Id.* at 104.) He also paid the family’s bills. Lucas did
10 not work. (*See* 4/9/15 Tr. at 213–14.) The couple had five children together.¹
11 (*See, e.g.*, 4/8/15 at 28.) During the separation, the children stayed at the house, with
12 the parents moving in and out. Lucas stayed at the house during the week, and White
13 stayed on weekends. (4/13/15 Tr. at 70.)

14 Unbeknownst to White, his wife had started a romantic relationship with
15 Averman in early 2012. (*Id.* at 67; 4/14/15 Tr. at 181.) Averman and White met more
16 than a decade earlier while the two were attending the Potter’s House Church.
17 (4/13/15 Tr. at 59.) White and Averman quickly became close friends. (*Id.* at 61.)
18 Averman was much younger than White. (*Id.* at 110.) He was in the Army National
19 Guard and had talked to White about his military training. (*Id.* at 112–13.) Averman
20 got divorced in April 2012. (*Id.* at 60.) Before Averman’s divorce, Averman and his
21 wife spent a great deal of time with Lucas and White. (*Id.* at 62–63.) Eventually White
22 became aware of the relationship between his longtime friend and his wife, and the
23 Whites separated. (*See, e.g., id.* at 97; 4/14/15 Tr. at 174.)

24
25
26 ¹ Lucas brought two children to the relationship, and the couple had three more.
27 (*See* 4/14/15 Tr. at 49.) The elder children referred to White as their father, and White
treated them as his own. (*See* 4/7/15 Tr. at 196; 4/8/15 Tr. at 30; 4/13/15 Tr. at 130.)

Shortly after the separation, Averman began staying the night at the White family home. (4/13/15 Tr. at 68–69.) 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 the children if they stayed at the house. (*Id.* at 71–72.) Averman quit his job after beginning his relationship with Lucas. (*Id.* at 132.) Because neither Lucas nor Averman were employed, White was responsible for all of the expenses. (*See* 4/9/15 Tr. at 213–14.) During the week, White bunked on an air mattress in the living room of a friend from the Potter’s House Church, Herman Allen. (4/13/15 Tr. at 182.)

Facebook messages in the weeks leading up to the shooting reveal White's displeasure and frustration with the situation. (Pet. Exs. 3–8.) Witnesses agreed, however, that he desperately wanted his family back. (4/13/15 Tr. at 98, 186; 4/14/15 Tr. at 32.) 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. (Pet. Ex. 2 at 16.) The next day, Tuesday, she asked him to talk with her the following day. (*Id.*) Later texts make clear the two talked on the Wednesday before the Friday shooting. (*Id.* at 14.) It is clear from later messages that Lucas promised White reconciliation with the family he wanted so desperately. (*Id.*) Allen testified White told him he wanted to reunite with Lucas and it was promising that they would. (4/13/15 Tr. at 186.) 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. (Pet. Ex. 8.) The text messages between White and Lucas also make it clear that Lucas was not moving

1 quickly enough to remove Averman from their lives so that they could return to being
2 a family, causing White frustration. (*Id.*)

3 The day before the shooting, White texted Lucas, “Sorry. Love you. Jus[t] want
4 us back.” (Pet. Ex. 2 at 14.) She responded, “You don’t know her like I do. It’s a country
5 song kinda reminds me of us. Have u heard it[?]” (*Id.*) Later, he wrote, “I wish you
6 wanted to be together this weekend. Goodbye [E]cho until you finally make a decision.
7 Hopefully after today you still want all y[o]u said u did yesterday. Its still here
8 waiting for you. I love you.” (*Id.* at 14.) He then asked her to go out with him that
9 weekend, but she said she could not because she was busy. (*Id.* at 13.) He wrote, “I
10 love you,” then “Hopefully,” and “Goodnight” at about 5:00 p.m. (*Id.*)

11 White continued to reach out to Lucas throughout the night while she was up
12 braiding her hair and the next morning. (*See* Pet. Ex. 2 at 1–13; 4/13/14 Tr. at 73–
13 74.) He expressed hope she still wanted to reconcile, like she had told him, but
14 consternation that she requested more time with Averman first. (Pet. Ex. 2 at 11–
15 12.) The messages over time shifted between anger and expressions of love. He urged
16 her to stop delaying their reconciliation. (*Id.* at 8–11.) For example, White wrote:

17 Please call me w[h]en you can. I wanna gv u my heart. I
18 love you echo sweetie. Please please stop seeing him if you
19 want us back. Please you have to. Please. It will never work
20 if you wont let him go...please. please I am beggin you. For
21 1 last time. I’m being totally honest. I can’t handle this
22 anymore. Honestly. I’m asking u to please stop seeing him.
23 Immediately. If u want me back this is it. I can’t keep doin
24 this. I’m going insane. I love you soooooo much.

25 (*Id.* at 8–9.) After growing frustration that Lucas would not speak to him and promise
26 to leave Averman right away (*id.* at 4–8), White told Lucas he would come over to the
27 house to meet with Averman (*id.* at 4). White’s anger escalated (*id.* at 1–4), but then
his tone shifted, and he asked, “Do you still want back so since you talked about on

1 Wednesday” [sic]. (*Id.* at 1.) He explained that his vitriol came from his frustration
2 that Lucas was delaying their reconciliation. (*Id.*)

3 The shooting occurred that day, on Friday. White’s boss testified that during
4 this period, White was coming into work at about 3:00 or 4:00 in the morning because
5 he was having trouble sleeping. (4/9/15 Tr. at 244–45.) His usual shift started at 5:00
6 a.m. (*Id.* at 244.) White would routinely come to the family home on Friday afternoon
7 to take care of the children for the weekend. (4/13/15 Tr. at 70, 79.) Allen, with whom
8 White was living during the week, explained that White would leave for work on
9 Friday morning and not return to Allen’s home until Sunday evening. (*Id.* at 180.)
10 Usually, White would get to the family home around 3:00 or 4:00 p.m. on Fridays. (*Id.*
11 at 79.) On the day of the shooting, he arrived shortly before noon. (*Id.* at 77.) That
12 morning, White went to work early and so left early. (4/9/15 Tr. at 246.) White and
13 his wife shared a single vehicle, which was left at the house for use in caring for the
14 children. (4/13/15 Tr. at 70–71.) During the week, White was without a car and either
15 had to walk to the family home or take the bus. (*Id.* at 116.) That morning, White
16 took a bus to his home. (*See* 4/9/15 Tr. at 147.)

17 Averman and two of White’s children testified about the events of that day.
18 White was not agitated when he arrived. (4/7/15 at 219; 4/8/15 at 68; 4/13/15 Tr. at
19 106.) White asked Lucas to speak with him, and she told him to return later. White
20 then asked Averman if he and Lucas could have five minutes alone, and they went
21 into a back bedroom. (4/13/15 Tr. at 79–80.) Averman went into the master bedroom.
22 (*Id.* at 81.)

23 At first, everything was quiet. Then, Averman testified he heard Lucas say,
24 “Troy, no, just stop.” (*Id.* at 82.) One son testified that he heard raised voices in the
25 back bedroom. (4/7/15 Tr. at 220.) The second son testified he heard Lucas say, “No,
26 please stop, I won’t go with Joe again.” (4/13/15 at 58.) The shots happened quickly

1 afterward. (*Id.* at 73.) Averman testified that White’s demeanor at the time of the
2 shooting had completely changed. He was upset and “to some extent irrational.” (*Id.*
3 at 124–25.) Only seconds passed between Lucas being shot and Averman being shot.
4 (*Id.* at 87.) The whole incident was over in a matter of a few seconds. (*Id.*)

5 After the shooting, Averman described White as confused, going in and out of
6 the room Averman was in. (4/13/15 Tr. at 125.) White tried to usher his children into
7 a bedroom so they would not see what had happened. (4/7/15 Tr. at 219; 4/13/15 Tr.
8 at 89.) White took a cell phone from Averman but initially had problems placing a
9 call to 911. (*See* 4/14/15 Tr. at 21.) Averman heard White saying he could not get the
10 phone to work. (4/13/15 Tr. at 101.) At approximately 11:50 a.m., the oldest child
11 called 911. (4/14/15 Tr. at 13.) White was able to call 911 and ask for medical services
12 about three minutes later. (*Id.*) The sirens could be heard very quickly thereafter.
13 (4/13/15 Tr. at 102.) A neighbor testified that he saw White come out of the house
14 hysterical and desperate. He then got into the car in the driveway. (4/8/15 Tr. at 164,
15 171.)

16 White left and drove to Prescott Arizona, birthplace of the Potter’s House
17 Church. (*See* 4/9/15 Tr. at 142.) During the drive to Arizona, White called Allen and
18 told him what had happened. (4/13/15 Tr. at 191–94.) Having previously heard about
19 the shooting, Allen had been trying to call White and was worried that White would
20 commit suicide. (*Id.* at 191, 205–06.) When Allen told White that Lucas had died and
21 Averman was in the hospital, White broke down in tears. (*Id.* at 197.) He had
22 previously asked how Lucas and Averman were doing. (*Id.*) Allen described White as
23 confused during their conversations. (*Id.* at 206–07.)

24 In Prescott, a crying White turned himself in without incident. (4/9/15 Tr. at 40, 47.)
25 It had been only a few hours since the shooting. (*See id.* at 141.) White told the police
26 in Prescott, “She needs help. We need to do something. She needs help.” (*Id.* at 46.)

1 He then started to cry and asked to see a counselor or psychiatrist. (*Id.* at 47.) He was
2 taken into custody. (*Id.* at 44.)

3 **2. Defense counsel rendered ineffective assistance by putting**
4 **forth an untenable argument for voluntary manslaughter.**

5 Because the defense theory was that the State could only prove voluntary
6 manslaughter and not first or second-degree murder, the dispositive issue of the trial
7 was whether the shooting was the result of an adequate provocation as opposed to
8 malice. (*See* Jury Instruction Nos. 5, 6, 13.) The defense requested a jury instruction
9 saying the provocation “can occur over either a long or short period of time and may
10 be the result of an ongoing series of events.” (4/16/15 Tr. at 18.) Defense counsel
11 acknowledged there were no Nevada cases supporting the request. (*Id.*) In fact,
12 Nevada law foreclosed the concept of prolonged provocation. *See* Nev. Rev. Stat.
13 § 200.060 (“[I]f there should appear to have been an interval between the assault or
14 provocation given and the killing, sufficient for the voice of reason and humanity to
15 be heard, the killing shall be attributed to deliberate revenge and punished as
16 murder.”). The court rejected the instruction.² (*Id.* at 19.)

17 The defense therefore needed to identify a specific provocation and argue the
18 State had not disproven it beyond a reasonable doubt. (*See* Jury Instruction No. 15a.)
19 The defense argued that White went to the house the day of the shooting to kick
20 Averman out of the home so that he and Lucas could reconcile (*See, e.g.*, 4/16/15 Tr.
21 at 96.) Lucas tried to stop White, and the three ended up in the hallway. (*Id.* at 97.)
22 Counsel then identified the provoking incident: “When Averman decides to interject
23 himself into the conversation and he sees Averman coming out the door that is a
24

25 ² Defense counsel, who also served as appellate counsel, continued to pursue this
26 theory on appeal. (*See* 2/17/16 Opening Br.) It was likewise rejected by the Nevada
27 Supreme Court. (*See* 4/16/17 Order.)

1 highly provoking injury, that is a injury of the most highly provoking type. . . . It's
2 the first time he's seen Joe since the betrayal." (*Id.* at 97–98.)

3 This theory was not internally consistent and had a gaping hole in it. According
4 to this theory, White went to the house to kick out Averman, saw Averman when he
5 arrived and calmly asked to speak to Lucas, but then was overcome by Averman's
6 presence after he talked to Lucas. What this theory did not explain was why there
7 was a shift. The defense offered no theory as to what happened in the room between
8 White and Lucas that would have prompted such an extreme reaction such that the
9 jury would have reasonable doubt White acted with malice. The State took advantage
10 of this gap in the defense theory³:

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

(4/16/15 Tr. at 51.) Then in rebuttal the prosecution argued:

16 That's not sudden heat of passion. They'd been separated
17 for months, he'd known about Joe since early June, Joe
18 moved in in late June. His text messages will show you that
19 he knew when Joe was over at that house. This wasn't a
20 secret then. And he wasn't surprised to find Joe at that
21 house that morning. That's also abundantly clear from the
22 text messages leading up to the murder. "I know Joe's
23 there. Why won't you just send him away so we can talk."
24 He knew what he was going to find when he went to that
25 house.

26 ³ Defense counsel had a constitutional obligation to not present a legally untenable
27 defense, particularly when a valid defense was available. Defense counsel's failure
undermines the reliability of the verdict. The reliability of the verdict was further
undermined when the state took advantage of defense counsels' ineffectiveness, by
using their untenable legal theory to impermissibly shift the burden to the defense.
The State had the burden of proving lack of provocation. *See Crawford v. State*, 121
P.3d 582, 587 (Nev. 2005).

1 (*Id.* at 110.)

2 Counsel performed deficiently by presenting the presence of Averman as a
3 “sudden and highly provoking injury” that would cast doubt on the State’s case for
4 murder. Instead, the defense needed to focus on what happened between White and
5 Lucas. Some of that evidence was already before the jury. White was not agitated
6 when he arrived at the house. (4/7/15 at 219; 4/8/15 at 68; 4/13/15 Tr. at 106.) When
7 he and Lucas went to speak in a bedroom, their voices were not raised. (4/7/15 Tr. at
8 220.) Then, one of White’s children testified he heard Lucas say, “No, please stop, I
9 won’t go with Joe again” and that the shots happened quickly afterward. (4/13/15 at
10 58, 73.) The State even recognized this evidence:

11 As for the conversation that took place in the bedroom, it
12 wasn’t about moving Joe out of the house, it was about the
13 defendant wanting her back and her not being willing to go
14 back. [One son] told you what he heard—the only things he
heard from that conversation were, no, Troy, please don’t,
fine, I’ll stop seeing Joe.

15 (4/16/15 Tr. at 111.)

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

22 But the defense had access to even more evidence to support this theory—
23 evidence from White himself. White confirms what the other evidence showed. The
24 Wednesday before the shooting, he and Lucas discussed reconciliation, and it was his
25 understanding that they would get back together that weekend. (Pet. Ex. 11 ¶7.) On
26 Thursday night, Lucas still had not told him she had kicked Averman out of the

1 house. (*Id.* ¶ 8.) White was upset that Averman was still at his home, and he had had
2 enough of it. He decided that if he and Lucas were going to get back together that
3 weekend, there was no need to wait. He decided to kick Averman out himself. (*Id.*
4 ¶ 10.) He brought the gun because he was worried Averman would start a physical
5 confrontation, and he wanted to be able to brandish it. Averman was fifteen years
6 younger and stronger. White knew Averman was in the Army Reserves and had
7 military training. White felt threatened and so misguidedly brought the gun to try to
8 hold Averman at bay. (*Id.* ¶ 11.)

9 When White and Lucas were alone in the bedroom, White told her she had to
10 make a final decision between him and Averman. Lucas chose Averman. (*Id.* ¶¶ 13–
11 14.) What happened next is “jumbled” for White. He remembers only snippets. (*Id.*
12 ¶ 14.) For example, he remembers turning Lucas over after she was shot and feeling
13 like he was seeing it from outside of his body. He could see himself looking at her. (*Id.*
14 ¶¶ 15–16.) He remembers being confused about what had happened and feeling like
15 everything happened quickly. (*Id.*) He remembers feeling “off”; the closest feeling he
16 can liken it to is as if he had not gotten enough sleep. He felt like there was no “top
17 of [his] head and [he] was floating in the moment.” (*Id.* ¶ 19.) He felt something “deep
18 inside [him] break.” (*Id.* ¶ 16.) When White left the house, after calling 911 and trying
19 to shield the children from what he had done, he did not know what had happened.
20 (*Id.* ¶¶ 17–20.) He went on autopilot and just started driving. (*Id.* ¶ 20.)

21 Counsel performed deficiently by failing to present this cogent, comprehensive
22 theory of voluntary manslaughter to the jury. Indeed, one of the cases defense counsel
23 relied upon to argue for continued provocation contained similar facts. (4/16/15 Tr. at
24 18.) In *Roberts v. State*, 717 P.2d 1115 (Nev. 1986), the Nevada Supreme Court held
25 the district court erred by not giving a voluntary manslaughter instruction. There,
26 the defendant and victim were in a serious romantic relationship. The day of the

1 killing, the victim stood up the defendant. The Nevada Supreme Court wrote, “He
2 would have been justified in viewing her ‘standing him up’ as a callused insult,
3 greatly aggravated by her taking up sexually with another man on the night of his
4 planned get-together with her. It is not unreasonable to infer from such
5 circumstances that his discovery provoked him into a sudden and excessive anger or
6 ‘heat of passion,’ as the statute reads.” *Id.* at 117 n.2. Here, the “callused insult” that
7 caused “sudden and excessive anger or ‘heat of passion’” was Lucas rejecting White
8 after promising reconciliation during an emotionally fraught week. Counsel
9 unreasonably failed to present this theory.

10 White was prejudiced by defense counsel’s choice of theory. The State argued
11 that White “over the three to four weeks . . . [had] been contemplating, thinking about
12 killing, weighing the consequences of his actions . . . And finally on July 27th he
13 determined, he premeditated to kill Echo Lucas White as he was texting her and
14 calling her and she wasn’t responding to his advances.” (4/16/15 Tr. at 58.) The jury
15 rejected this and found White guilty of second-degree murder instead. (4/17/15
16 Verdict.) But because the defense had not done enough to cast doubt on the State’s
17 argument for malice or to argue the State had not proven lack of provocation beyond
18 a reasonable doubt, the jury did not convict White of voluntary manslaughter instead.
19 White was also prejudiced as concerns his conviction for attempted murder of
20 Averman. If the jury found White acted in the heat of passion in response to a
21 sufficient provocation, then he could not have been guilty of attempted murder.
22 (See Jury Instruction 20; 4/16/15 Tr. at 12 (State conceding as much).) This is because
23 attempted voluntary manslaughter is not a crime in Nevada. *Curry v. State*, 792 P.2d
24 396, 397 (Nev. 1990).

25 The record reflects that, had there been a legally sound argument for voluntary
26 manslaughter, there is a reasonable probability at least one juror would have chosen

1 the lesser offense for the murder charge, and chosen not to convict on the charge of
2 attempted murder. Notably, during deliberations the jury sent a note saying, “we
3 would like to hear what happened before and prior to the moment of the shooting.”
4 (Pet. Ex. 10; *see* Pet. Ex. 1 (marking exhibit as submitted 4/17/15).) Counsel was
5 ineffective, and White is entitled to relief.

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1. Issue a writ of habeas corpus to have Troy White brought before the Court so that he may be discharged from his unconstitutional confinement;
2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this amended petition and any defenses that may be raised by respondents; and
3. Grant such other and further relief as, in the interests of justice, may be appropriate.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

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VERIFICATION

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

DATED this 27th of September, 2022.

/s/Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 27th of September, 2022.

/s/Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2022, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Alexander Chen, Alexander.Chen@clarkcountynvda.com, Motions@clarkcountynvda.com.

I further certify that some of the participants in the case are not registered 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 people:

Troy White #1143868 High Desert State Prison P.O. Box 650 Indian Springs, NV 89070	Charles L. Finlayson Office of the Attorney General 100 North Carson Street Carson City, NV 89701-4717
Clark County District Attorney 200 Lewis Ave. Las Vegas, NV 89101	

/s/ Kaitlyn O'Hearn
An Employee of the
Federal Public Defender
District of Nevada

1 **OPWH**

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

5 TROY WHITE,

6 Petitioner,

7 vs.

8 CALVIN JOHNSON,

9 Respondent,

Case No: A-2-859004-W
Department 1

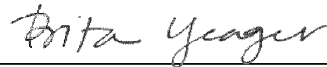
**ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS**

10
11 Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on
12 September 27, 2022. The Court has reviewed the Petition and has determined that a response
13 would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of
14 his/her liberty, and good cause appearing therefore,

15 **IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this
16 Order, answer or otherwise respond to the Petition and file a return in accordance with the
17 provisions of NRS 34.360 to 34.830, inclusive.

18 **IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's
19 Calendar on **November 29, 2022, at 11:00 a.m.**

20 Dated this 3rd day of October, 2022

21 

22 **E8A 41C 039D C8DD**
23 **Bita Yeager**
24 **District Court Judge**

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Troy White, Plaintiff(s)

CASE NO: A-22-859004-W

7 vs.

DEPT. NO. Department 1

8 Calvin Johnson, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order for Petition for Writ of Habeas Corpus was served via the court's
13 electronic eFile system to all recipients registered for e-Service on the above entitled case as
14 listed below:

Service Date: 10/3/2022

15 Steven Wolfson

motions@clarkcountyda.com

16 Jonathan Kirshbaum

Jonathan_Kirshbaum@fd.org



1 **RSPN**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JONATHAN VANBOSKERCK
6 Chief Deputy District Attorney
7 Nevada Bar #006528
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7
8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

9 TROY RICHARD WHITE,
10 #1383512

11 Petitioner,

CASE NO: A-22-859004-W

12 -vs-

C-12-286357-1

13 THE STATE OF NEVADA,

DEPT NO: I

14 Respondent.

15
16 **STATE'S RESPONSE TO PETITIONER'S SUPPLEMENT TO PETITION
17 FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

18 DATE OF HEARING: December 22, 2022

19 TIME OF HEARING: 11:00 a.m.

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District
22 Attorney, and hereby submits the attached Points and Authorities in Response to
23 Petitioner's Supplement to Petition for Writ Of Habeas Corpus (Post-Conviction) and
24 Motion for Appointment of Counsel.

25 This response is made and based upon all the papers and pleadings on file herein,
26 the attached points and authorities in support hereof, and oral argument at the time of
27 hearing, if deemed necessary by this Honorable Court.

28 //

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\\CLARKCOUNTYDA.NET\CRM\CASE2\2012\42491\201242491C-WRIT-(TROY RICHARD WHITE)-001.DOCX

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On December 12, 2012, Petitioner Troy White (hereinafter "Petitioner") was
4 charged by way of Information with the following counts: Count 1, BURGLARY
5 WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060);
6 Count 2, MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS
7 200.010, 200.030, 193.165); Count 3, ATTEMPT MURDER WITH USE OF A
8 DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165);
9 Count 4, CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON
10 (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 5, 6, 7, 8, and 9, CHILD
11 ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony - NRS 200.508(1)).

12 On February 4, 2013, Petitioner filed a pre-trial Petition for Writ of Habeas
13 Corpus, to which the State filed a Return on March 19, 2013. On March 27, 2013, the
14 district court granted Petitioner's Petition as to Count 1 only and denied the Petition as
15 to Count 2 through 9. The State filed a Notice of Appeal that same day.

16 On August 8, 2014, the Supreme Court filed an Order affirming the district
17 court's dismissal of Count 1, holding that a person cannot burglarize his own home.

18 On March 24, 2015, the State filed an Amended Information with the following
19 charges: Count 1, MURDER WITH USE OF A DEADLY WEAPON (Category A
20 Felony - NRS 200.010, 200.030, 193.165); Count 2, ATTEMPT MURDER WITH USE
21 OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330,
22 193.165); Count 3, CARRYING A CONCEALED FIREARM OR OTHER DEADLY
23 WEAPON (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 4, 5, 6, 7, and 8,
24 CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony - NRS
25 200.508(1)).

26 Jury trial began on April 6, 2015, and concluded on April 17, 2015. The State
27 also filed a Second Amended Information on April 6, 2015, charging the same counts
28 as listed in the Amended Information. On April 17, 2015, the jury returned a verdict as

1 follows: as to Count 1, Guilty of Second Degree Murder with Use of a Deadly Weapon;
2 as to Count 2, Guilty of Attempt Murder with Use of a Deadly Weapon; as to Count 3,
3 Guilty of Carrying a Concealed Firearm or Other Deadly Weapon; and as to Counts 4,
4 5, 6, 7, and 8, Guilty of Child Abuse, Neglect, or Endangerment. Petitioner was
5 sentenced on July 20, 2015 as follows: as to COUNT 1, to LIFE with the eligibility for
6 parole after serving a MINIMUM of TEN (10) YEARS, plus a CONSECUTIVE term
7 of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole
8 eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; as to
9 COUNT 2, to a MAXIMUM of ONE HUNDRED NINETY-TWO (192) MONTHS
10 with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS, plus a
11 CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a
12 MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a
13 Deadly Weapon; CONSECUTIVE to COUNT 1; as to COUNT 3, to a MAXIMUM of
14 FORTY-EIGHT (48) MONTHS with a MINIMUM Parole Eligibility of NINETEEN
15 (19) MONTHS, CONCURRENT WITH COUNTS 1 & 2; as to COUNT 4, to a
16 MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of
17 TWENTY-FOUR (24) MONTHS, CONSECUTIVE TO COUNTS 1 & 2; as to
18 COUNT 5, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole
19 Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER
20 COUNTS; as to COUNT 6, to a MAXIMUM of SIXTY (60) MONTHS with a
21 MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT
22 with ALL OTHER COUNTS; as to COUNT 7, to a MAXIMUM of SIXTY (60)
23 MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24)
24 MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 8, to a
25 MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of
26 TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS;
27 with ONE THOUSAND EIGHTY-EIGHT DAYS (1,088) DAYS credit for time served.
28 The AGGREGATE TOTAL sentence was LIFE with a MINIMUM OF THIRTY-

1 FOUR (34) YEARS. The Judgment of Conviction was filed July 24, 2015, but an
2 Amended Judgment of Conviction was filed February 5, 2016, removing the aggregate
3 sentence total language.

4 On August 12, 2015, Petitioner filed a Notice of Appeal. On April 26, 2017, the
5 Nevada Supreme Court issued its Order affirming Petitioner's Judgment of Conviction.
6 Remittitur issued on May 25, 2017.

7 On April 24, 2018, Petitioner filed a post-conviction Petition for Writ of Habeas
8 Corpus. On December 20, 2018, Petitioner filed a Supplemental Brief in Support of his
9 Petition for Writ of Habeas Corpus and Motion for Authorization to Obtain Expert and
10 for Payment of Fees Incurred Herein. The State filed its Response to Petitioner's
11 Supplemental Petition and Opposition to the Motion for Authorization to Obtain Expert
12 and for Payment of Fees Incurred on March 26, 2019. On April 24, 2019, Petitioner
13 filed his Reply and Motion for Authorization to Obtain Investigator and Payment of
14 Fees Incurred Herein. The State filed its Opposition on May 2, 2019. The district court
15 granted the Motion for an Investigator on June 12, 2019. The Order was filed on June
16 21, 2019.

17 On September 2, 2020, this Court denied the Petition in part as to the cell phone
18 and ordered a limited evidentiary on the remaining issues—specifically whether counsel
19 was ineffective for failing to investigate the cell phone. On March 4, 2021, this Court
20 held an evidentiary hearing where Petitioner's prior counsel, Scott Coffee Esq., testified
21 regarding his investigation of Petitioner's cell phone. Following the evidentiary hearing,
22 the Court denied the Petition entirely. On April 13, 2021, the Court filed its Findings of
23 Fact, Conclusions of Law and Order. The Notice of Entry of Findings of Fact,
24 Conclusions of Law and Order was filed on April 15, 2021.

25 On April 16, 2021, Petitioner filed a Notice of Appeal. On March 1, 2022, the
26 Nevada Supreme Court issued its Order affirming the denial of Petitioner's
27 Postconviction Petition for a Writ of Habeas Corpus. Remittitur issued on March 1,
28

1 2022.

2 On September 27, 2022, Petitioner filed a Petition for Writ of Habeas Corpus as
3 well as a Motion for the Court to Take Judicial Notice of the Filings in Mr. White's
4 Criminal Case Number.¹

5 **STATEMENT OF THE FACTS**

6 At sentencing, the district court relied on the following factual synopsis set forth
7 in White's Supplemental Pre-Sentencing Report:

8
9 On July 27, 2012, Las Vegas Metropolitan Police Department
10 officers were dispatched to local residence regarding a shooting. Upon
11 arrival, officers observed a female, later identified as victim #1
12 (VC2226830) lying on the floor in a bedroom in the residence. Victim #1
13 was unconscious and had an apparent gunshot wound to her chest. A male,
14 later identified as victim #2 (VC2226831), was lying on the floor outside
15 the doorway to the bedroom and he also had apparent gunshot wounds.
16 Five children, later identified as nine year old minor victim #3
17 (VC2226832), five year old minor victim #4 (VC2226833), eight year old
18 minor victim #5 (VC2226834), six month old minor victim #6
19 (VC2226835), and two year old minor victim #7 (VC2226836), were also
20 present in the house.

21 Medical personnel responded and transported victim #1 and victim #2 to a
22 local trauma hospital. Officers later learned that victim #1 arrived at the
23 hospital and after attempts to revive her, she was pronounced dead. Victim
24 #2 underwent surgery to treat his injuries.

25 During their investigation, officers learned that victim #1 was married to a
26 male, later identified as the defendant, Troy Richard White, for
27 approximately eight years. They have three children in common, identified
28 as minor victim #5, minor victim #6, and minor victim #7, and she has two
additional children, identified as minor victim #3 and minor victim #4,
with another male.

In June 2012, victim #1 and Mr. White separated and Mr. White moved
out of the family home. However, when Mr. White exercised his visitation

¹ The State does not oppose Petitioner's Motion for the Court to Take Judicial Notice of the Filings in Mr. Whites Criminal Case Number to the extent that it requests the Court to take judicial notice of all documents filed in Petitioner's criminal case.

1 on the weekends, he would stay in the home and victim #1 would stay
2 elsewhere.

3 Towards the end of June 2012, Mr. White became aware that victim #1
4 was dating victim #2. Victim #1 and victim #2 talked about finding their
5 own place, but Mr. White insisted that victim #1 stay in the home and
6 advised her that it was okay for victim #2 to stay there as well.

7 On the date of the offense, Mr. White went to the residence and told victim
8 #1 that he needed to speak with her in a back room. Victim #1 agreed and
9 went into a bedroom with Mr. White. After approximately five minutes,
10 victim #2 heard victim #1 yell at Mr. White to stop and thought she was in
11 trouble. Victim #2 opened the bedroom door and saw Mr. White shove
12 victim #1 and then shoot her once in the chest or stomach. Mr. White then
13 turned, shot victim #2, and victim #2 fell to the ground. One bullet struck
14 victim #2 in the arm and another bullet struck him in the left abdomen. One
15 of the bullets that struck victim #2 traveled through his body, penetrated
16 the back wall to the room, and exited the residence. At the time victim #2
17 was shot, he was standing within feet of the crib which contained six month
18 old minor victim #6.

19 After shooting victim #2, Mr. White stood over him and showed him the
20 gun. Mr. White told victim #2 that he was going to jail and he was going
21 to kill him. Mr. White also asked victim #2, "How does it feel now?" As
22 victim #2 lay on the floor, Mr. White kept coming into the residence to
23 threaten him. Mr. White finally left the residence and victim #2 heard a car
24 leave.

25 Once Mr. White fled the scene, minor victim #3 ran to a neighbor's house
26 to call for police.

27 Later that date, Mr. White turned himself in at the Yavapai County
28 Sheriff's Department in Arizona. Upon being questioned, Mr. White
reported that he was wanted in the Las Vegas area for shooting someone.
He stated he fled in the vehicle that was now parked in the sheriff's
department lot. Mr. White further stated the gun he used to shoot people in

1 the Las Vegas area was inside the vehicle in the spare tire compartment
2 area.

3 On August 10, 2012, Mr. White was extradition back from Arizona and
4 booked accordingly at the Clark County Detention Center.

5 Supplemental PSI, filed August 3, 2015, at 4-5.

6 **ARGUMENT**

7 **I. PETITIONER’S CLAIMS ARE PROCEDURALLY BARRED.**

8 **A. Application of the Procedural Bars is Mandatory.**

9 The Nevada Supreme Court has granted no discretion to the district courts
10 regarding whether to apply the statutory procedural bars. Instead, the Nevada Supreme
11 Court has emphatically and repeatedly stated that the procedural bars *must* be applied.

12 The district courts have *a duty* to consider whether post-conviction claims are
13 procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234,
14 112 P.3d 1070, 1076 (2005). Riker held that the procedural bars “cannot be ignored
15 when properly raised by the State.” Id. at 233, 112 P.3d at 1075. Accord, State v.
16 Huebler, 128 Nev. 192, 197, 275 P.3d 91, 94-95, footnote 2 (2012), cert. denied, 568
17 U.S. 1147, 133 S.Ct. 988 (2013) (“under the current statutory scheme the time bar in
18 NRS 34.726 is *mandatory, not discretionary*” (emphasis added)).

19 Even “a stipulation by the parties cannot empower a court to disregard the
20 mandatory procedural default rules.” State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d
21 676, 681 (2003); accord, Sullivan v. State, 120 Nev. 537, 540, footnote 6, 96 P.3d 761,
22 763-64, footnote 6 (2004) (concluding that a petition was improperly treated as timely
23 and that a stipulation to the petition’s timeliness was invalid). The Sullivan Court
24 “expressly conclude[d] that the district court should have denied [a] petition” because
25 it was procedurally barred. Sullivan, 120 Nev. at 542, 96 P.3d at 765.

26 The district courts have zero discretion in applying the procedural bars because
27 to allow otherwise would undermine the finality of convictions. In holding that
28 “[a]pplication of the statutory procedural default rules to post-conviction habeas

1 petitions is mandatory,” the Riker Court noted:

2 Habeas corpus petitions that are filed many years after conviction are an
3 unreasonable burden on the criminal justice system. The necessity for a
4 workable system dictates that there must exist a time when a criminal
conviction is final.

5 Riker, 121 Nev. at 231, 112 P.3d at 1074.

6 Moreover, strict adherence to the procedural bars promotes the best interests of
7 the parties:

8
9 At some point, we must give finality to criminal cases. Should we allow
10 [petitioner’s] post conviction relief proceeding to go forward, we would
11 encourage defendants to file groundless petitions for federal habeas corpus
12 relief, secure in the knowledge that a petition for post-conviction relief
13 remained indefinitely available to them. This situation would prejudice
14 both the accused and the State since the interests of both the petitioner and
the government are best served if post-conviction claims are raised while
the evidence is still fresh.

15 Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (citations omitted).

16 **B. Petitioner’s Substantive Claims are Waived for Failure to Raise on**
17 **Direct Appeal.**

18 All of petitioner’s claims were appropriate and available for direct appeal.
19 Substantive claims are waived as they should have been raised on direct appeal. NRS
20 34.724(2)(a); NRS 34.810(1)(b); Evans v. State, 117 Nev. 609, 646-47, 29 P .3d 498,
21 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P .2d 1058, 1059 (1994),
22 disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P .2d 222 (1999).

23 Petitioner claims he was denied his right under the Sixth and Fourteenth
24 Amendments to the United States Constitution to effective trial counsel. Petition, at 6.
25 Petitioner claims that since the evidence presented at trial supported a theory of
26 voluntary manslaughter and defense counsel put forth an untenable argument for
27 voluntary manslaughter, Petitioner’s trial counsel was ineffective. Petition, at 7-8, 13.
28 Petitioner’s complaint is barred as waived. Petitioner’s claim was available for direct

1 appeal, and therefore, cannot be considered by this Court. Thus, Petitioner’s substantive
2 claim is waived for failing to raise it on direct appeal.

3 **C. Petitioner’s Second Petition is Time Barred.**

4 NRS 34.726(1) states that “unless there is good cause shown for delay, a petition
5 that challenges the validity of a judgment or sentence must be filed within 1 year after
6 entry of the judgment of conviction or, if an appeal has been taken from the judgment,
7 within 1 year after the Supreme Court issues its remittitur.” The one-year time bar is
8 strictly construed and enforced. Gonzales v. State, 118 Nev. 590, 593, 53 P.3d 901, 902
9 (2002). The Nevada Supreme Court has held that the “clear and unambiguous”
10 provisions of NRS 34.726(1) demonstrate an “intolerance toward perpetual filing of
11 petitions for relief, which clogs the court system and undermines the finality of
12 convictions.” Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).

13 Remittitur issued from Petitioner’s direct appeal on May 22, 2017. (Findings of
14 Fact, Conclusions of Law, and Order, filed April 13, 2021, p. 4). Therefore, Petitioner
15 had until May 22, 2018, to file a timely habeas petition. Petitioner filed the second
16 Petition on September 27, 2022. (Petition for Writ of Habeas Corpus (Post-Conviction),
17 filed September 27, 2022). As such, the second Petition is time barred.

18 **D. The State Affirmatively Pleads Laches.**

19 NRS 34.800 recognizes that a post-conviction petition should be dismissed when
20 delay in presenting issues would prejudice the State in responding to the petition or in
21 retrial. NRS 34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice
22 to the State if “[a] period of five years [elapses] between the filing of a judgment of
23 conviction, an order imposing sentence of imprisonment or a decision on direct appeal
24 of a judgment of conviction and the filing of a petition challenging the validity of a
25 judgment of conviction.” See also, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d
26 1268, 1269 (1984), superseded by statute as recognized by, Hart v. State, 116 Nev. 558,
27 1 P.3d 969 (2000) (“petitions that are filed many years after conviction are an
28 unreasonable burden on the criminal justice system. The necessity for a workable

1 system dictates that there must exist a time when a criminal conviction is final.”). To
2 invoke the presumption, the statute requires that the State specifically plead
3 presumptive prejudice. NRS 34.800(2).

4 More than five years has passed since remittitur issued from Petitioner’s direct
5 appeal on May 22, 2017. (Findings of Fact, Conclusions of Law, and Order, filed April
6 13, 2021, p. 4). As such, the State pleads statutory laches under NRS 34.800(2) and
7 prejudice under NRS 34.800(1) against the Second Petition, which was not filed until
8 September 27, 2022. After such a passage of time, the State is prejudiced in its ability
9 to answer the Second Petition because the State will be forced to track down witnesses
10 who may have died or retired in order to prove a case that is several years old. Assuming
11 witnesses are available, their memories will have certainly faded and will not present to
12 a jury the same way they did in 2015.

13 **E. Petitioner’s Second Petition is Barred as an Abuse of Writ.**

14 Petitioner’s Second Petition is procedurally barred because it is an abuse of the
15 writ. NRS 34.810(2) reads:

16 A second or successive petition *must* be dismissed if the judge or
17 justice determines that it fails to allege new or different grounds
18 for relief and that the prior determination was on the merits or, if
19 new and different grounds are alleged, the judge or justice finds
that the failure of the Defendant to assert those grounds in a prior
petition constituted an abuse of the writ.

20 (emphasis added). Second or successive petitions are petitions that either fail to allege
21 new or different grounds for relief and the grounds have already been decided on the
22 merits or that allege new or different grounds but a judge or justice finds that the
23 Defendant’s failure to assert those grounds in a prior petition would constitute an abuse
24 of the writ. Second or successive petitions will only be decided on the merits if the
25 Defendant can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110
26 Nev. 349, 358, 871 P.2d 944, 950 (1994).

27 //

28 //

1 The Nevada Supreme Court has stated: “Without such limitations on the
2 availability of post-conviction remedies, prisoners could petition for relief in perpetuity
3 and thus abuse post-conviction remedies. In addition, meritless, successive and
4 untimely petitions clog the court system and undermine the finality of convictions.”
5 Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that
6 “[u]nlike initial petitions which certainly require a careful review of the record,
7 successive petitions may be dismissed based solely on the face of the petition.” Ford v.
8 Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or
9 allegation was previously available with reasonable diligence, it is an abuse of the writ
10 to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991).
11 Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at
12 1074.

13 Petitioner’s repeated filings of petitions creates the very issue that the Nevada
14 Supreme Court addressed in Lozada. Petitioner’s prior petition has been denied, yet
15 Petitioner’s continual filing of pleadings serves only to “clog the court system and
16 undermine the finality” of his conviction. Lozada, 110 Nev. At 358, 871 P.2d at 950.
17 Raising a new ground for relief in a successive habeas petition is an abuse of the writ.
18 Therefore, this Court should find that Petitioner’s instant Petition must be dismissed.

19 **II. PETITIONER CANNOT DEMONSTRATE GOOD CAUSE TO** 20 **IGNORE HIS PROCEDURAL DEFAULT.**

21 To overcome the procedural bars, a petition must: (1) demonstrate good cause for
22 delay in filing his petition or for bringing new claims or repeating claims in a successive
23 petition; and (2) demonstrated undue or actual prejudice. NRS 34.726(1); NRS
24 34.810(3).² “To establish good cause, petitioners must show that an impediment
25 external to the defense prevented their compliance with the applicable procedural rule.
26 A qualifying impediment might be shown where the factual or legal basis for a claim
27 was not reasonably available at the time of default.” Clem v. State, 119 Nev. 615, 621,
28

² NRS 34.800(1) requires a showing of reasonable diligence and a fundamental miscarriage of justice.

1 81 P.3d 521, 525 (2003), rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543
2 U.S. 947, 125 S.Ct. 358 (2004); see also Hathaway v. State, 119 Nev. 248, 251, 71 P.3d
3 503, 506 (2003) (“In order to demonstrate good cause, a petitioner must show that an
4 impediment external to the defense prevented him or her from complying with the state
5 procedural default rules.”); Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (neither
6 ineffective assistance of counsel, nor a physician’s declaration in support of a habeas
7 petition were sufficient “good cause” to overcome a procedural default, whereas finding
8 by Supreme Court that defendant was suffering from Multiple Personality Disorder
9 was). An external impediment could be “that the factual or legal basis for a claim was
10 not reasonably available to counsel, or that ‘some interference by officials’ made
11 compliance impracticable.” Id. (quoting, Murray v. Carrier, 477 U.S. 478, 488, 106 S.
12 Ct. 2639, 2645 (1986)); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904 (citing Harris
13 v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

14 The Nevada Supreme Court has held that, “appellants cannot attempt to
15 manufacture good cause.” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause
16 there must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119
17 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229,
18 1230 (1989), superseded by statute as recognized by, Huebler, 128 Nev. at 197, n.2, 275
19 P.3d at 95 n.2). Excuses such as the lack of assistance of counsel when preparing a
20 petition as well as the failure of trial counsel to forward a copy of the file to a petitioner
21 have been found not to constitute good cause. See Phelps v. Dir. Nev. Dep’t of Prisons,
22 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute as recognized
23 by Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111
24 Nev. 335, 890 P.2d 797 (1995).

25 Petitioner cannot demonstrate good cause because all the facts and law necessary
26 to raise these claims were available at the appropriate time. Nor does Petitioner attempt
27 to establish an impediment external to the defense. Petitioner appears to attempt to
28 satisfy his burden to demonstrate good cause by arguing that he is raising the same

1 argument in federal court and that his prior habeas counsel was ineffective for not
2 raising the complaints found in this Petition. Neither of these contentions establish good
3 cause. Federal litigation is irrelevant to the Nevada procedural rules. Colley v. Warden,
4 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Further, Petitioner did not have the
5 right to the effective assistance of post-conviction counsel during the previous round of
6 habeas litigation so even if prior post-conviction counsel was ineffective it still fails to
7 establish good cause. Halbert v. Michigan, 545 U.S. 605, 610, 125 S.Ct. 2582, 2587
8 (2005) (The right of assistance of counsel extends only to “first appeals as of right ...
9 however, ... a state need not appoint counsel ... in discretionary appeals”); Brown v.
10 McDaniel, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014); McKague v. Whitley, 112
11 Nev. 159, 164, 912 P.2d 255, 258 (1996) (“no right to effective assistance of counsel,
12 let alone any constitutional or statutory right to counsel at all, [exists in] post-conviction
13 proceedings”). Indeed, in Brown, the Nevada Supreme Court directly said that “[w]e
14 have consistently held that the ineffectiveness of post-conviction counsel in a noncapital
15 case may not constitute ‘good cause’ to excuse procedural defaults.” Brown, 130 Nev.
16 at 569, 331 P.3d at 870.

17 Petitioner should be barred from addressing good cause in any reply since to do
18 so would allow him to short circuit the adversarial process by denying the State any
19 opportunity to respond. This Court should not tolerate such dishonest litigation
20 practices. See, Righetti v. Eighth Judicial District Court, 133 Nev. 42, 47, 388 P.3d
21 643, 648 (2017) (declining to adopt a rule in a capital case that “rewards and thus
22 incentivizes less than forthright advocacy”). Notably, the Federal Public Defender’s
23 Office has been repeatedly warned by the Nevada Supreme Court that it owes the
24 judiciary better briefs that honestly address the requirements of Chapter 34. Thomas v.
25 State, 510 P.3d 754, 763, 138 Nev. Adv. Op. 37, p. 9-10 (2022) (inadequate briefing
26 before the district and appellate courts does not satisfy the pleading requirements of
27 NRS Chapter 34); Chappell v. State, 137 Nev. Adv. Op. 83, p. 12-15 20-21, 27, footnote
28 8, 501 P.3d 935, 949-50, 953, 956, footnote 8 (2021) (failure to offer specific and factual

1 pleadings warrants denial of habeas relief); Moore v. State, 134 Nev. 262, 264, 417 P
2 .3d 356, 359 (2018) (habeas petitioners have a duty to honestly disclose facts).

3 **III. PETITIONER CANNOT DEMONSTRATE THE SUBSTANTIAL**
4 **PREJUDICE NECESSARY TO IGNORE HIS PROCEDURAL**
5 **DEFAULTS.**

6 To establish prejudice “a petitioner must show that errors in the proceedings
7 underlying the judgment worked to the petitioner’s actual and substantial
8 disadvantage.” State v. Huebler, 128 Nev. 192, 196-197 275 P.3d 91, 94-95 (2012),
9 cert. denied, 568 U.S. 1147, 133 S.Ct. 988 (2013). Further, a finding of prejudice
10 sufficient to disregard the procedural bars must be based upon prejudice sufficient to
11 support a finding of ineffective assistance of counsel. Crump v. Warden, 113 Nev. 293,
12 304-05, 934 P.2d 247, 254 (1997) (error which rises to the level of ineffective assistance
13 of counsel establishes cause and prejudice under NRS 34.810(1)(b)).

14 Petitioner cannot demonstrate the substantial prejudice necessary to ignore the
15 procedural bars because his underlying complaints are meritless. Petitioner complains
16 that trial counsel was ineffective in addressing voluntary manslaughter. Specifically,
17 he alleges that counsel failed to “identify the required provocation for voluntary
18 manslaughter” and needed to explain what happened in the room between White and
19 Lucas instead of presenting “the presence of Averman as a ‘sudden and provoking
20 injury[.]” Petition, at 7, 14-15. Regardless, the complaints attack virtually
21 unchallengeable strategic decisions. Doleman v. State, 112 Nev. 842, 848, 921 P.2d
22 278, 280-281 (1996); Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 168 (2002). Counsel
23 addressed the provocation element of voluntary manslaughter in a reasonable fashion.

24 Voluntary manslaughter involves “a serious and highly provoking injury
25 inflicted upon the person killing, sufficient to excite an irresistible passion in a
26 reasonable person, or an attempt by the person killed to commit a serious personal injury
27 on the person killing.” NRS 200.050(1). Moreover, the killing must result from a
28 sudden, violent, irresistible passion that was “caused by a provocation apparently

1 sufficient to make the passion irresistible.” NRS 200.040(2); *see also* NRS 200.060;
2 Newson v. State, 136 Nev. 181, 185, 462 P.3d 246, 250 (2020).

3 Petitioner’s trial counsel argued the victim hid her affair from Petitioner (Trial
4 Transcript “TT” April 16, 2015, p. 74). Petitioner’s trial counsel encouraged the jury to
5 make a reasonable inference that Petitioner was provoked. With the assistance of
6 Petitioner’s trial counsel, the jury was able to infer that since Petitioner left all of his
7 belongings at his friend’s residence and did not bring any clothing with him, Petitioner’s
8 killing was not premeditated or deliberate (TT April 16, 2015, p. 86). Petitioner’s trial
9 counsel also addressed Petitioner’s provocation during his closing argument to the jury
10 (TT April 16, 2015, p. 88). Petitioner’s trial counsel read Petitioner’s text messages that
11 expressed his anger towards Echo, the victim, over Joe Averman (TT April 16, 2015,
12 p. 85). Petitioner’s trial counsel read the massive number of texts between Petitioner
13 and the victim before the incident (TT April 16, 2015, p. 78-80). Trial counsel also read
14 an important text message from the victim that was sent to Petitioner indicating that
15 “she needed a few days” and didn’t want to be with somebody like Petitioner (TT April
16 16, 2015, p. 85). Petitioner’s trial counsel even indicated that the quarrel between him
17 and the victim was sudden. (TT April 16, 2015, p. 98). As such, the jury could
18 reasonably infer that Petitioner reacted with anger and frustration sufficient to trigger
19 Petitioner to kill the victim. As shown *supra*, Petitioner is grasping for straws in its
20 argument that trial counsel was ineffective for addressing voluntary manslaughter and,
21 thus, Petitioner’s argument lacks substance and merit. Therefore, this Petition must be
22 denied.

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CONCLUSION

For the foregoing reasons, the State respectfully requests this Petition for Writ Of Habeas Corpus be DENIED.

DATED this 15th day of November, 2022.

Respectfully submitted,

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

BY /s/ Jonathan Vanboskerck
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 15th day of November, 2022, by electronic transmission to:

JONATHAN M. KIRSHBAUM
JONATHAN_KIRSHBAWM@FD.ORG

BY /s/ Andrea Carrera
Andrea Carrera
Secretary for the District Attorney's Office

JV/ac/

A-22-859004-W

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

December 22, 2022

A-22-859004-W Troy White, Plaintiff(s)
vs.
Calvin Johnson, Defendant(s)

December 22, 2022 11:00 AM Petition for Writ of Habeas Corpus

HEARD BY: Yeager, Bitia

COURTROOM: RJC Courtroom 05C

COURT CLERK: Tucker, Michele

RECORDER: Lizotte, Lisa

REPORTER:

PARTIES PRESENT:

Jonathan M. Kirshbaum

Attorney for Plaintiff

Joshua D Judd

Attorney for Defendant

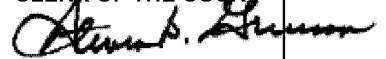
Laura Barrera

Attorney for Plaintiff

JOURNAL ENTRIES

Court NOTED this is the second petition, first was file 2018, which was ruled on and affirmed. The Court does not see anything in the pleading for good cause to proceed forward. Ms. Kirshbaum there are allegations of ineffective counsel. COURT ORDERED, matter CONTINUED.

CONTINUED TO: 3/09/23 9:00 AM



RPLY
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Attorney for Petitioner Troy White

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

Troy White,
Petitioner,
v.
State of Nevada,
Respondents.

Case No. A-22-859004-W
(C-12-286357-1)
Dept. No. I

Date of Hearing: March 9, 2023
Time of Hearing: 9:00 a.m.

(Not a Death Penalty Case)

**PETITIONER'S REPLY TO THE STATE'S RESPONSE TO WHITE'S PETITION
FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

Troy White, through counsel, filed a petition for writ of habeas corpus on September 27, 2022.¹ The State filed a response on November 15, 2022.² White now files a reply in support of his petition for writ of habeas corpus.

¹ 09/27/2022, Petition.

² 11/15/2022, State's response.

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POINTS AND AUTHORITIES

A. **Good cause and prejudice exist to excuse any procedural bars to White's claim in his petition for writ of habeas corpus.**

The State argues White's petition should be dismissed as procedurally barred.³ Specifically, the State asserts the petition is untimely under NRS § 34.726(1), is a successive petition under NRS § 34.810(2), and is an abuse of the writ.⁴ The State also argues White's claims are waived because he failed to raise them on direct appeal and pleads laches under NRS §34.800(2) and prejudice under NRS 34 §800(1).

Turning preliminarily to the question of whether White's claims are waived because he did not raise them in his direct appeal, the State's argument fails because White's claim is an ineffective assistance of counsel claim. White could not have raised this claim on appeal because it has to be raised in a postconviction petition. *Corbin v. State*, 111Nev. 378, 381, 892 P.2d 580, 582 (1995) (Nevada appellate courts "will not entertain claims of ineffective assistance of counsel on direct appeal"). The correct question to ask on this point is whether White can show good cause and prejudice to overcome the procedural bars to his petition. As demonstrated *infra*, White can overcome the bars.

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

³ 11/15/2022, State's response.

⁴ *Id.*

1 demonstrated by a showing ‘that the factual or legal basis for a claim was not
2 reasonably available to counsel, or that some interference by officials, made
3 compliance impracticable.”); *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506
4 (2003) (*quoting Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397
5 (1986) (citations and quotations omitted)).

6 To show actual prejudice, White can demonstrate the claim is meritorious, and
7 if properly considered, White would prevail. *See Hogan v. Warden*, 24 109 Nev. 952,
8 960, 860 P.2d 710, 716 (1993) (“not merely that the errors of [the proceedings] created
9 possibility of prejudice, but that they worked to his actual and substantial
10 disadvantage, in affecting the state proceedings with error of constitutional
11 dimensions,” *quoting United States v. Frady*. 456 U.S. 152, 170, (1982)).

12 **1. White demonstrates good cause.**

13 **a. Post-conviction counsel Christopher Oram was**
14 **ineffective for failing to raise Ground One.**

15 In the instant petition, White raises one claim that his post-conviction counsel,
16 Christopher Oram, failed to raise. In Ground One, White argues his trial counsel was
17 ineffective for failing to properly argue for voluntary manslaughter. The evidence in
18 this case easily supported a theory of voluntary manslaughter. White’s trial attorneys
19 recognized this fact and premised their defense on the theory that the State could
20 only prove voluntary manslaughter, not first or second-degree murder. However, the
21 trial attorneys undermined their own defense by presenting a case for voluntary
22 manslaughter that was inadequate and not legally tenable. White’s post-conviction
23 counsel was ineffective because he failed to notice trial counsel’s deficient voluntary
24 manslaughter theory and raise a claim on this basis even though it pervades the
25 entire defense presentation, as well as the appeal. In reviewing White’s case, it should
26 have been apparent to Oram that trial counsel’s defense theory was inadequate
27 because it contradicted Nevada law and left essential questions unanswered. As

1 explained in Section 2 *infra*, this claim is meritorious because trial counsel was
2 ineffective. Had Oram raised these claims, White could have demonstrated that trial
3 counsel's ineffectiveness materially affected the outcome of his trial and sentence.

4 **b. White provides new evidence to support Ground One.**

5 Regardless of whether White demonstrates good cause for Ground One, this
6 Court should nevertheless rule on the merits of Ground One because White offers
7 new evidence to support this claim. White's post-conviction counsel Christopher
8 Oram failed to adequately review the record in this case and note trial counsel's
9 untenable defense theory. If he had, he would have easily discovered that trial
10 counsel failed to properly argue the element of provocation to support voluntary
11 manslaughter despite the facts in this case supporting a finding of provocation. The
12 new evidence attached to the petition is material; the declaration from Petitioner
13 White shows that his trial counsel was ineffective for failing to present vital evidence
14 at trial to support the defense theory of voluntary manslaughter. White was unable
15 to present this evidence in his original state habeas proceedings due to the
16 ineffectiveness of both his trial and post-conviction counsel, all of whom failed to
17 present an adequate legal theory to support the voluntary manslaughter defense.
18 Refusing to address the merits of this claim would be manifestly unjust. Thus, this
19 Court should consider Ground One on the merits regardless of whether White
20 demonstrates good cause to overcome the procedural bars.

21 **c. The Nevada Supreme Court should overrule *Brown v.***
22 ***McDaniel* and find good cause overcoming procedural**
23 **default.**

24 White demonstrates good cause to overcome the procedural bars to Ground
25 One in part because his prior post-conviction counsel was ineffective for failing to
26 raise this claim in his initial petition; however, the Nevada Supreme Court in *Brown*
27 *v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014), refused to recognize ineffective

1 assistance of post-conviction counsel as good cause to overcome the procedural bar in
2 non-capital cases. With all due respect, the Court’s decision in *Brown* was wrongly
3 decided. The time is ripe for the Court to reconsider *Brown* now that the U.S.
4 Supreme Court has limited *Martinez* in the recent decision of *Shinn v. Ramirez*, 142
5 S. Ct. 1718 (2022),

6 The decision in *Brown* stems in part from the U.S. Supreme Court’s decision
7 in *Martinez v. Ryan*, 566 U.S. 1 (2012). In federal habeas proceedings, if a petitioner
8 procedurally defaults a claim of ineffective assistance of trial counsel, the petitioner
9 may be able to show good cause to overcome the default if the petitioner had
10 inadequate assistance from initial state post-conviction counsel. In order to make this
11 good cause argument, a petitioner needs to show initial review post-conviction
12 counsel was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668
13 (1984) for failing to raise the relevant trial-counsel-ineffectiveness claim. That is, the
14 petitioner must establish post-conviction counsel performed deficiently by failing to
15 raise the claim, and the petitioner must also eventually prove the merits of the
16 underlying trial-counsel-ineffectiveness claim.

17 The U.S. Supreme Court’s decision in *Martinez* was a correct interpretation of
18 the equitable principles governing procedural default under federal law. As the
19 *Martinez* opinion explains, when a petitioner has a winning trial-counsel-
20 ineffectiveness claim, state courts need to have a process for the petitioner to raise
21 that claim. 566 U.S. at 10-11. But if the petitioner does not receive adequate
22 assistance from state post-conviction counsel, there is a risk that “no court will
23 review” the petitioner’s winning claim. *Id.* at 11. The problem is especially acute
24 because “[w]ithout the help of an adequate attorney, a prisoner will have . . .
25 difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim.” *Id.*
26 After all, ineffective assistance of counsel claims “often require investigative work,”
27 “an understanding of trial strategy,” and the development of “evidence outside the

1 trial record,” all of which requires “an effective attorney.” *Id.* at 11-12. For these
2 reasons, the federal courts allow a petitioner to show cause to avoid the default of a
3 trial-counsel-ineffectiveness claim when the petitioner did not receive adequate
4 assistance from a state post-conviction attorney.

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

10 Under the new rules, prisoners who suffered constitutional violations would
11 hit a dead end. *Martinez* previously provided a window of opportunity for prisoners
12 to raise meritorious ineffective-trial-counsel claims in federal court, even if the state
13 court refused to consider them. But under *Shinn* and *Brown*, if a Nevada prisoner’s
14 trial counsel was ineffective, the prisoner would never have the opportunity to raise
15 this claim or develop an evidentiary record if the prisoner lacked effective post-
16 conviction counsel—no Nevada state nor federal court would ever consider whether
17 the prisoner’s right to effective trial counsel was violated.

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

25 The *Brown* Court found the *Martinez* decision unpersuasive, but the reasoning
26 in *Brown* is suspect, and the Court should reconsider its previous analysis. First, the
27 *Brown* Court distinguished *Martinez* by noting there is no constitutional right to

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

16 In short, the U.S. Supreme Court's decision in *Martinez* is persuasive, and the
17 Nevada Supreme Court's rejection of its principles in *Brown* is ripe for
18 reconsideration after the U.S. Supreme Court's decision in *Shinn*. Indeed, other State
19 courts have begun to reconsider their post-conviction review procedures in light of
20 *Shinn*. See *Frost v. State*, 514 P.3d 1182, 1188 n.6 (Or. 2022) (granting relief in part
21 because the recent *Shinn* decision indicates State review of the errors of petitioner's
22 state post-conviction counsel is likely the end of the line); *Commonwealth v. Debois*,
23 281 A.3d 1062 (Pa. Super. Ct. 2022) (reversing a dismissal, in part because, "An
24 affirmance in this instance would effectively close off any avenue for additional state-
25 post conviction collateral review. That result would forever cut off any opportunity
26 for Appellant to create an evidentiary record for his ineffective claims in light of
27 *Shinn*."). The Nevada Supreme Court should overrule *Brown* and allow non-capital

1 petitioners like White to argue good cause to overcome procedural bar based on the
2 inadequate assistance of state post-conviction counsel.

3 **2. White demonstrates prejudice because Ground One has**
4 **merit.**

5 In Ground One, White argues his trial attorneys were ineffective for not
6 properly arguing for voluntary manslaughter.

7 At trial, the State argued White acted with premeditation and deliberation
8 when he shot and killed his wife, Echo Lucas.⁵ White's defense was that the State
9 could only prove voluntary manslaughter. In Nevada, voluntary manslaughter
10 requires "a serious and highly provoking injury inflicted upon the person killing,
11 sufficient to excite an irresistible passion in a reasonable person, or an attempt by
12 the person killed to commit a serious personal injury on the person killing," Nev. Rev.
13 Stat. § 200.050. "The killing must be the result of that sudden, violent impulse of
14 passion supposed to be irresistible." Nev. Rev. Stat. § 200.060; *see* Nev. Rev. Stat. §
15 200.040 (manslaughter is a voluntary killing "upon a sudden heat of passion, caused
16 by a provocation apparently sufficient to make the passion irresistible"). The key
17 issue for the defense to focus on was the presence of a sufficient provocation to
18 undermine a finding of malice, which is required for a murder conviction.

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

23 The evidence supported the theory of voluntary manslaughter and suggests
24 that there was adequate provocation. Communication between White and Echo shows
25 that White believed Echo was going to end her affair with Joe Averman, and that
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27 ⁵ *See, e.g.*, 4/16/15 Tr. at 68–99; 4/6/15 Second Am. Information.

1 White was hopeful he was going to get his family back.⁶ That was White's state of
2 mind when he went to the house the day of the shooting. However, shortly after he
3 arrived, his dream of having his family back was dashed when Echo told him she was
4 choosing Averman over White and would not be ending the affair after all.⁷ White
5 recalls that at that point he entered a dissociative state, and his memory of the crime
6 is jumbled.⁸ It's clear that Echo's decision to stay with Averman was unexpected by
7 White, and constituted provocation sufficient to support a theory of voluntary
8 manslaughter.

9 Despite the existence of adequate provocation, defense counsel instead pursued
10 an untenable legal theory for their voluntary manslaughter defense, that was
11 unsupported by Nevada law. Defense counsel first attempted to pursue a theory of
12 prolonged provocation, asking for a jury instruction stating that provocation can
13 occur over a long or short period of time and can be the result of a series of events.⁹
14 This prolonged-provocation theory was not supported by law and, in fact, is contrary
15 to the concept of provocation in Nevada. *See Nev. Rev. Stat. § 200.060* (“[I]f there
16 should appear to have been an interval between the assault or provocation given and
17 the killing, sufficient for the voice of reason and humanity to be heard, the killing
18 shall be attributed to deliberate revenge and punished as murder”). Predictably, the
19 court rejected the request for the instruction.¹⁰

20 White's trial attorneys needed to identify a specific provocation and argue that
21 the State had not disproven it beyond a reasonable doubt. While the evidence
22 supported a theory that Echo's sudden change of heart about reuniting with White
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24 ⁶ Pet. Exs. 2-8; 09/27/2022 Petition at 9-11 (White's petition describes in detail
the messages between White and Echo submitted at trial).

25 ⁷ Pet. Ex. 11 at 2.

26 ⁸ Pet. Ex. 11 at 2.

27 ⁹ 4/16/15 Tr. at 18.

¹⁰ 4/16/15 Tr. at 19.

1 was provocation, White's attorneys decided to argue that the provocation was based
2 on Averman interjecting himself into the conversation between Echo and White when
3 White was at the house.¹¹ The defense argument was that White was provoked by
4 seeing Averman. That theory was not supported by the evidence. White had already
5 seen Averman when he first arrived at the house and no conflict ensued at that point.
6 Furthermore, it left open the question of what happened in the conversation between
7 Echo and White immediately before he shot her. The State took advantage of these
8 gaps in the defense theory by commenting on them during closing arguments.¹²

9 White's attorneys performed deficiently by failing to raise the argument for
10 provocation that was supported by the record: Echo's final and unexpected rejection
11 of White caused him to snap. His actions that followed were not premeditated and
12 deliberate, but the result of a sudden, violent impulse of passion. This was voluntary
13 manslaughter, not second-degree murder. Looking beyond the evidence presented,
14 White's trial attorneys could have discovered more support for this theory of
15 provocation by speaking with White. His declaration, submitted with the petition,
16 confirms that the provoking incident was the conversation with Echo, and his
17 expectation of reuniting with his family being upended.¹³ Counsel performed
18 deficiently by failing to present this cogent, comprehensive theory of voluntary
19 manslaughter to the jury.

20 White was prejudiced by defense counsel's choice of theory. The jury found
21 White guilty of second-degree murder because the defense had not done enough to
22 cast doubt on the State's argument for malice and to show that the State had not
23 proven lack of provocation beyond a reasonable doubt.¹⁴ Tellingly, during
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25 ¹¹ 4/16/15 Tr. at 97-98.

26 ¹² 4/16/15 Tr. at 51; 110.

27 ¹³ Pet. Ex. 11.

¹⁴ 4/17/15 Verdict.

1 deliberations the jury sent a note saying, “we would like to hear what happened before
2 and prior to the moment of the shooting.”¹⁵ In the same respect, White was also
3 prejudiced with regards to his conviction for attempted murder of Averman. If the
4 jury found White acted in the heat of passion in response to a sufficient provocation,
5 then he could not have been guilty of attempted murder.¹⁶ This is because attempted
6 voluntary manslaughter is not a crime in Nevada. *Curry v. State*, 792 P.2d 396, 397
7 (Nev. 1990).

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

12 **Conclusion**

13 Contrary to the State’s arguments in their response, this Court should grant
14 White’s petition for writ of habeas corpus because his claim is meritorious and he can
15 overcome the procedural bars.

16 **PRAYER FOR RELIEF**

17 Accordingly, Troy White respectfully requests that this Court:

- 18 1. Issue a writ of habeas corpus to have Troy White brought before the
19 Court so that he may be discharged from his unconstitutional confinement;
- 20 2. Conduct an evidentiary hearing at which proof may be offered
21 concerning the allegations in this amended petition and any defenses that may be
22 raised by respondents; and
- 23 3. Grant such other and further relief as, in the interests of justice, may be
24 appropriate.

26 ¹⁵ Pet. Ex. 10; *see* Pet. Ex. 1 (marking exhibit as submitted 4/17/15)

27 ¹⁶ Jury Instruction 20; 4/16/15 Tr. at 12

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DATED this 15th of February, 2023.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Laura Barrera
Laura Barrera
Assistant Federal Public Defender

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AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated February 15, 2023.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Laura Barrera
Laura Barrera
Assistant Federal Public Defender

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2023, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court’s electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Motions@clarkcountynyda.com.

I further certify that some of the participants in the case are not registered 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 people:

Troy White #1143868 High Desert State Prison P.O. Box 650 Indian Springs, NV 89070	Jaimie Stilz Office of the Attorney General 555 E. Washington Ave., Suite 3900 Las Vegas, NV 89101 jstilz@ag.nv.gov
Clark County District Attorney 200 Lewis Ave. Las Vegas, NV 89101	

/s/ Kaitlyn O’Hearn
An Employee of the
Federal Public Defender
District of Nevada

A-22-859004-W

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

March 09, 2023

A-22-859004-W Troy White, Plaintiff(s)
vs.
Calvin Johnson, Defendant(s)

March 09, 2023 09:00 AM Petition for Writ of Habeas Corpus

HEARD BY: Yeager, Bitu **COURTROOM:** RJC Courtroom 05C

COURT CLERK: Tucker, Michele

RECORDER: Lizotte, Lisa

REPORTER:

PARTIES PRESENT:

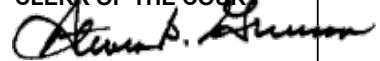
Jonathan M. Kirshbaum Attorney for Plaintiff

Joshua D Judd Attorney for Defendant

Laura Barrera Attorney for Plaintiff

JOURNAL ENTRIES

Arguments by Ms. Barrera. Mr. Judd submitted on the pleadings. Court STATED it is bound by case law and ORDERED, Petition for Writ of Habeas Corpus DENIED. Mr. Judd to prepare the Order.



1 **RTRAN**

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5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

7
8 **TROY WHITE,**

9 **Plaintiff,**

10 **CASE NOS. A-22-859004-W**
11 **C-12-286357-1**
12 **DEPT. NO. 1**

13 **vs.**

14 **CALVIN JOHNSON,**

15 **Defendant.**

16 **BEFORE THE HONORABLE BITA YEAGER, DISTRICT JUDGE**
17 **THURSDAY, MARCH 9, 2023 AT 9:24 A.M.**

18 **RECORDER'S TRANSCRIPT RE:**
19 **PETITION FOR WRIT OF HABEAS CORPUS**

20 **APPEARANCES:**

21 **FOR THE PLAINTIFF:**

22 **JONATHAN M. KIRSHBAUM**
23 **LAURA BARRERA**
24 **Assistant Federal Public Defenders**

25 **FOR THE DEFENDANT:**

JOSHUA D. JUDD
Deputy District Attorney

Recorded by: LISA A. LIZOTTE, COURT RECORDER

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(THURSDAY, MARCH 9, 2023 AT 9:24 A.M.)

THE COURT: Page 3, State of Nevada versus Troy White -- I'm sorry, this is Troy White versus Calvin Johnson, A-22-859004-W. All right. And then, Mr. Waters, are you arguing this on behalf of the State?

MR. WATERS: No. Ms. Overly is coming.

THE COURT: Ms. Who? Ms. Sarah Overly?

MR. WATERS: Ms. Overly.

THE COURT: Overly. Okay. So I'm just going to trail it for a minute for the DA to appear.

(Whereupon, the matter was trailed and recalled at 9:51 a.m.)

THE COURT: All right. So State of Nevada versus Troy -- sorry, Troy White versus Calvin Johnson, A-22-859004-W. It appears that Mr. Judd is here on behalf of the State, and we're probably going to need everyone's appearances and everyone's Bar numbers.

MR. JUDD: Joshua Judd on behalf of the State, Bar Number 14890.

MS. BARRERA: Laura Barrera for Troy White, Bar Number 14320C.

MR. KIRSHBAUM: Mine too?

THE COURT: Yeah.

MR. KIRSHBAUM: Jonathan Kirshbaum also for Troy White, 12908C.

THE COURT: Okay. So this is on for a Petition for Writ of Habeas Corpus. The Court notes that this is a successive petition, and I guess I need to ask before we start the argument because it appears in the reply -- I mean I know

1 that you're making an argument that the Supreme Court should reconsider
2 *Brown versus McDaniel*.

3 So I'm not the Supreme Court, so are you asking this Court,
4 then, to set aside and not consider the controlling case law in *Brown* and also the
5 statute under I think it's 34.810 in reaching a determination regarding the good
6 cause of appellate counsel not raising those issues? I just want to make sure
7 that I understand that that's your argument.

8 MS. BARRERA: Yes, Your Honor. We understand that *Brown* is
9 binding on this Court –

10 THE COURT: Okay.

11 MS. BARRERA: -- but we want to preserve this argument because
12 we think the time is ripe for the Nevada Supreme Court to reconsider *Brown*
13 given the United States Supreme Court's decision in *Shinn versus Ramirez*.

14 THE COURT: All right. So I mean I can tell you how I'm inclined to
15 rule because I've got controlling case law, you know, unfortunately it's not in your
16 favor, but If you would like to make a full appellate record, I would certainly let
17 you do so.

18 I will tell you that based on *Brown versus McDaniel*, since the
19 allegation of the good cause is that appellate counsel was ineffective under that
20 controlling case law, our Nevada Supreme court has found that that does not
21 satisfy the good cause requirement to overcome the successive petition
22 especially in a case where it is not a death penalty case. So I would – I feel that I
23 am constrained to follow 34.810 I believe it is -- I printed it out and then I forgot
24 to bring it with me – and the *Brown* case. But certainly if you would like to make
25 a full appellate record, I will certainly allow you to do so.

1 MS. BARRERA: Your Honor, I would just add that there was a
2 dissent in *Brown*, and Justice Cherry noted that in Nevada the first and only
3 opportunity to present an ineffective assistance of counsel claim is in post-
4 conviction proceedings. Given *Shinn*, the new case *Shinn*, there is now – it's
5 unlikely for many people that they will ever be able to present meritorious claims
6 related to ineffective assistance of counsel if they also had ineffective post-
7 conviction counsel.

8 And I would add that some other states have reconsidered
9 their post-conviction review proceedings. We cited to some of those cases in the
10 briefing from Oregon and Pennsylvania, and with that I would just submit it on the
11 briefs.

12 THE COURT: All right. Thank you.

13 MR. JUDD: I'll submit it, Your Honor.

14 THE COURT: All right. So I appreciate the argument, and, you
15 know, the hard work that's gone into these briefs. Unfortunately I find that I am
16 constrained by the statute and controlling case law based on the case law that
17 has to do with successive petitions and the good cause. So I'm going to deny
18 the petition based on that. Thank you.

19 MS. BARRERA: Thank you, Your Honor.

20 THE COURT: All right. And then, Mr. Judd, will you please prepare
21 the order that has those findings in it?

22 MR. JUDD: Will do, Your Honor.


23 THE COURT: Thank you.

24 (Whereupon, the proceedings concluded.)

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

A handwritten signature in black ink, reading "Lisa A. Lizotte". To the right of the signature is a short horizontal line.

LISA A. LIZOTTE
Court Recorder

1 **ORDR**

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

4 **THE STATE OF NEVADA**

Case No. A-22-859004-W
(C-12-286357-1)

5 **Plaintiff(s)**

Dept. No. 1

6 **vs.**

7 **TROY RICHARD WHITE,**

8 **Defendant(s)**

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10
11 **ORDER DENYING DEFENDANT'S PETITIONER'S PETITION FOR WRIT OF**
12 **HABEAS CORPUS (POST-CONVICTION)**

13 **DATE OF HEARING: March 09, 2023**
14 **TIME OF HEARING: 09:00 A.M.**

15 THIS MATTER having come on for hearing before the above entitled Court on the
16 9th day of March, 2023, the Defendant not being present, REPRESENTED BY
17 JONATHAN M. KIRSHBAUM and LAURA BARRERA, Asst. Federal Public Defenders,
18 the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through
19 JOSHUA D. JUDD, Deputy District Attorney, and the Court having heard the arguments of
counsel and good cause appearing therefore, the Court makes the following order:

20 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

21 **PROCEDURAL HISTORY**

22 On December 12, 2012, Petitioner Troy White (hereinafter "Petitioner") was
23 charged by way of Information with the following counts: Count 1, BURGLARY
24 WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060);
25 Count 2, MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS
26 200.010, 200.030, 193.165); Count 3, ATTEMPT MURDER WITH USE OF A DEADLY
27 WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 4,
28 CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C

1 Felony - NRS 202.350(1)(d)(3)); and Counts 5, 6, 7, 8, and 9, CHILD ABUSE, NEGLECT,
2 OR ENDANGERMENT (Category B Felony - NRS 200.508(1)).

3 On February 4, 2013, Petitioner filed a pre-trial Petition for Writ of Habeas
4 Corpus, to which the State filed a Return on March 19, 2013. On March 27, 2013, the
5 district court granted Petitioner's Petition as to Count 1 only and denied the Petition as
6 to Count 2 through 9. The State filed a Notice of Appeal that same day. On August 8, 2014,
7 the Supreme Court filed an Order affirming the district court's dismissal of Count 1, holding
8 that a person cannot burglarize his own home. On March 24, 2015, the State filed an
9 Amended Information with the following charges: Count 1, MURDER WITH USE OF A
10 DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165); Count 2,
11 ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS
12 200.010, 200.030, 193.330, 193.165); Count 3, CARRYING A CONCEALED FIREARM
13 OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350(1)(d)(3)); and Counts
14 4, 5, 6, 7, and 8, CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony
15 – NRS 200.508(1)).

16 Jury trial began on April 6, 2015, and concluded on April 17, 2015. The State also
17 filed a Second Amended Information on April 6, 2015, charging the same counts as listed in
18 the Amended Information. On April 17, 2015, the jury returned a verdict as follows: as to
19 Count 1, Guilty of Second Degree Murder with Use of a Deadly Weapon; as to Count 2,
20 Guilty of Attempt Murder with Use of a Deadly Weapon; as to Count 3, Guilty of Carrying a
21 Concealed Firearm or Other Deadly Weapon; and as to Counts 4, 5, 6, 7, and 8, Guilty of
22 Child Abuse, Neglect, or Endangerment. Petitioner was sentenced on July 20, 2015 as
23 follows: as to COUNT 1, to LIFE with the eligibility for parole after serving a MINIMUM
24 of TEN (10) YEARS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO
25 (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for
26 the Use of a Deadly Weapon; as to COUNT 2, to a MAXIMUM of ONE HUNDRED
27 NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX
28 (76) MONTHS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192)

1 MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the
2 Use of a Deadly Weapon; CONSECUTIVE to COUNT 1; as to COUNT 3, to a MAXIMUM
3 of FORTY-EIGHT (48) MONTHS with a MINIMUM Parole Eligibility of NINETEEN (19)
4 MONTHS, CONCURRENT WITH COUNTS 1 & 2; as to COUNT 4, to a MAXIMUM of
5 SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24)
6 MONTHS, CONSECUTIVE TO COUNTS 1 & 2; as to COUNT 5, to a MAXIMUM of
7 SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24)
8 MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 6, to a
9 MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-
10 FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 7, to a
11 MAXIMUM of SIXTY (60) MONTHS with a 11 MINIMUM Parole Eligibility of
12 TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to
13 COUNT 8, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility
14 of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS;
15 with ONE THOUSAND EIGHTY-EIGHT DAYS (1,088) DAYS credit for time served. The
16 AGGREGATE TOTAL sentence was LIFE with a MINIMUM OF THIRTY FOUR (34)
17 YEARS. The Judgment of Conviction was filed July 24, 2015, but an Amended Judgment of
18 Conviction was filed February 5, 2016, removing the aggregate sentence total language.

19 On August 12, 2015, Petitioner filed a Notice of Appeal. On April 26, 2017, the
20 Nevada Supreme Court issued its Order affirming Petitioner's Judgment of Conviction.
21 Remittitur issued on May 25, 2017.

22 On April 24, 2018, Petitioner filed a post-conviction Petition for Writ of Habeas
23 Corpus. On December 20, 2018, Petitioner filed a Supplemental Brief in Support of his
24 Petition for Writ of Habeas Corpus and Motion for Authorization to Obtain Expert and for
25 Payment of Fees Incurred Herein. The State filed its Response to Petitioner's Supplemental
26 Petition and Opposition to the Motion for Authorization to Obtain Expert and for Payment of
27 Fees Incurred on March 26, 2019. On April 24, 2019, Petitioner filed his Reply and Motion
28 for Authorization to Obtain Investigator and Payment of Fees Incurred Herein. The State

1 filed its Opposition on May 2, 2019. The district court granted the Motion for an Investigator
2 on June 12, 2019. The Order was filed on June 21, 2019.

3 On September 2, 2020, this Court denied the Petition in part as to the cell phone
4 and ordered a limited evidentiary on the remaining issues—specifically whether counsel was
5 ineffective for failing to investigate the cell phone. On March 4, 2021, this Court held an
6 evidentiary hearing where Petitioner’s prior counsel, Scott Coffee Esq., testified regarding
7 his investigation of Petitioner’s cell phone. Following the evidentiary hearing, the Court
8 denied the Petition entirely. On April 13, 2021, the Court filed its Findings of Fact,
9 Conclusions of Law and Order. The Notice of Entry of Findings of Fact, Conclusions of Law
10 and Order was filed on April 15, 2021.

11 On April 16, 2021, Petitioner filed a Notice of Appeal. On March 1, 2022, the
12 Nevada Supreme Court issued its Order affirming the denial of Petitioner’s Postconviction
13 Petition for a Writ of Habeas Corpus. Remittitur issued on March 1, 2022.

14 On September 27, 2022, Petitioner filed a Petition for Writ of Habeas Corpus as well
15 as a Motion for the Court to Take Judicial Notice of the Filings in Mr. White’s Criminal
16 Case Number. On November 15, 2022, the State filed its Response To Petitioner’s
17 Supplement To Petition For Writ Of Habeas Corpus (Post-Conviction), and on February 15,
18 2023, Petitioner filed it’s Reply To The State’s Response To White’s Petition For Writ Of
19 Habeas Corpus (Post-Conviction).

20 ANALYSIS

21 **I. THE PETITIONER’S CLAIMS ARE PROCEDURALLY BARRED.**

22 **A. Application of the Procedural Bars is Mandatory.**

23 The Nevada Supreme Court has granted no discretion to the district courts regarding
24 whether to apply statutory procedural bars. Instead, the Nevada Supreme Court has
25 emphatically and repeatedly stated that the procedural bars must be applied.

26 The district courts have a duty to consider whether post-conviction claims are
27 procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112
28 P.3d 1070, 1076 (2005). Riker held that the procedural bars “cannot be ignored when

1 properly raised by the State.” Id. at 233, 112 P.3d at 1075. Accord, State v. Huebler, 128
2 Nev. 192, 197, 275 P.3d 91, 94-95, footnote 2 (2012), cert. denied, 568 U.S. 1147, 133 S.Ct.
3 988 (2013) (“under the current statutory scheme the time bar in NRS 34.726 is mandatory,
4 not discretionary” (emphasis added)).

5 Even “a stipulation by the parties cannot empower a court to disregard the mandatory
6 procedural default rules.” State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003);
7 accord, Sullivan v. State, 120 Nev. 537, 540, footnote 6, 96 P.3d 761, 763-64, footnote 6
8 (2004) (concluding that a petition was improperly treated as timely and that a stipulation to
9 the petition’s timeliness was invalid). The Sullivan Court “expressly conclude[d] that the
10 district court should have denied [a] petition” because it was procedurally barred. Sullivan,
11 120 Nev. at 542, 96 P.3d at 765.

12 The district courts have no discretion in applying procedural bars because to allow
13 otherwise would undermine the finality of convictions. In holding that “[a]pplication of the
14 statutory procedural default rules to post-conviction habeas petitions is mandatory,” the
15 Riker Court noted:

16 Habeas corpus petitions that are filed many years after conviction are an
17 unreasonable burden on the criminal justice system. The necessity for a
18 workable system dictates that there must exist a time when a criminal
19 conviction is final.

20 Riker, 121 Nev. at 231, 112 P.3d at 1074.

21 Moreover, strict adherence to the procedural bars promotes the best interests of
22 the parties:

23 At some point, we must give finality to criminal cases. Should we allow
24 [petitioner’s] post conviction relief proceeding to go forward, we would
25 encourage defendants to file groundless petitions for federal habeas corpus
26 relief, secure in the knowledge that a petition for post-conviction relief
27 remained indefinitely available to them. This situation would prejudice both
28 the accused and the State since the interests of both the petitioner and the
evidence is still fresh.

1 Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (citations omitted).

2 **B. Petitioner’s Substantive Claims are Waived for Failure to Raise on Direct**
3 **Appeal.**

4 All of petitioner’s claims were appropriate and available for direct appeal.
5 Substantive claims are waived as they should have been raised on direct appeal. NRS
6 34.724(2)(a); NRS 34.810(1)(b); Evans v. State, 117 Nev. 609, 646-47, 29 P .3d 498, 523
7 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P .2d 1058, 1059 (1994), disapproved on
8 other grounds, Thomas v. State, 115 Nev. 148, 979 P .2d 222 (1999).

9 Petitioner claims he was denied his right under the Sixth and Fourteenth Amendments
10 to the United States Constitution to effective trial counsel. Petition, at 6. Petitioner claims
11 that since the evidence presented at trial supported a theory of voluntary manslaughter and
12 defense counsel put forth an untenable argument for voluntary manslaughter, Petitioner’s
13 trial counsel was ineffective. Petition, at 7-8, 13. Petitioner’s complaint is barred as waived.
14 Petitioner’s claim was available for direct appeal, and therefore, cannot be considered by this
15 Court. Thus, Petitioner’s substantive claim is waived for failing to raise it on direct appeal.

16 **C. Petitioner’s Second Petition is Time Barred.**

17 NRS 34.726(1) states that “unless there is good cause shown for delay, a petition that
18 challenges the validity of a judgment or sentence must be filed within 1 year after entry of
19 the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year
20 after the Supreme Court issues its remittitur.” The one-year time bar is strictly construed and
21 enforced. Gonzales v. State, 118 Nev. 590, 593, 53 P.3d 901, 902 (2002). The Nevada
22 Supreme Court has held that the “clear and unambiguous” provisions of NRS 34.726(1)
23 demonstrate an “intolerance toward perpetual filing of petitions for relief, which clogs the
24 court system and undermines the finality of convictions.” Pellegrini v. State, 117 Nev. 860,
25 875, 34 P.3d 519, 529 (2001).

26 Remittitur issued from Petitioner’s direct appeal on May 22, 2017. (Findings of Fact,
27 Conclusions of Law, and Order, filed April 13, 2021, p. 4). Therefore, Petitioner had until
28

1 May 22, 2018, to file a timely habeas petition. Petitioner filed the second Petition on
2 September 27, 2022. (Petition for Writ of Habeas Corpus (Post-Conviction), filed September
3 27, 2022). As such, the second Petition is time barred.

4 **D. Petitioner’s Second Petition is Barred as an Abuse of Writ.**

5 Petitioner’s Second Petition is procedurally barred because it is an abuse of the writ.
6 NRS 34.810(2) reads:

7 A second or successive petition must be dismissed if the judge or justice
8 determines that it fails to allege new or different grounds for relief and that
9 the prior determination was on the merits or, if new and different grounds
10 are alleged, the judge or justice finds that the failure of the Defendant to
11 assert those grounds in a prior petition constituted an abuse of the writ.
12 (emphasis added). Second or successive petitions are petitions that either
13 fail to allege new or different grounds for relief and the grounds have
14 already been decided on the merits or that allege new or different grounds
15 but a judge or justice finds that the Defendant ’s failure to assert those
16 grounds in a prior petition would constitute an abuse of the writ. Second or
17 successive petitions will only be decided on the merits if the Defendant can
18 show good cause and prejudice.

19 NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950
20 (1994).

21 The Nevada Supreme Court has stated: “Without such limitations on the availability
22 of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse
23 post-conviction remedies. In addition, meritless, successive and untimely petitions clog the
24 court system and undermine the finality of convictions.” Lozada, 110 Nev. at 358, 871 P.2d
25 at 950. The Nevada Supreme Court recognizes that “[u]nlike initial petitions which certainly
26 require a careful review of the record, successive petitions may be dismissed based solely on
27 the face of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In
28 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). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231,
112 P.3d at 1074.

1 Petitioner's repeated filings of petitions creates the very issue that the Nevada
2 Supreme Court addressed in Lozada. Petitioner's prior petition has been denied, yet
3 Petitioner's continual filing of pleadings serves only to "clog the court system and
4 undermine the finality" of his conviction. Lozada, 110 Nev. At 358, 871 P.2d at 950. Raising
5 a new ground for relief in a successive habeas petition is an abuse of the writ. Therefore, this
6 Court finds that Petitioner's instant Petition must be dismissed.

7 **II. PETITIONER CANNOT DEMONSTRATE GOOD CAUSE TO**
8 **IGNORE HIS PROCEDURAL DEFAULT.**

9 To overcome the procedural bars, a petition must: (1) demonstrate good cause for
10 delay in filing his petition or for bringing new claims or repeating claims in a successive
11 petition; and (2) demonstrated undue or actual prejudice. NRS 34.726(1); NRS 34.810(3).
12 "To establish good cause, petitioners must show that an impediment external to the defense
13 prevented their compliance with the applicable procedural rule. A qualifying impediment
14 might be shown where the factual or legal basis for a claim was not reasonably available at
15 the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003), rehearing
16 denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004); see also
17 Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate
18 good cause, a petitioner must show that an impediment external to the defense prevented him
19 or her from complying with the state procedural default rules."); Pellegrini, 117 Nev. at 887,
20 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician's declaration in
21 support of a habeas petition were sufficient "good cause" to overcome a procedural default,
22 whereas finding by Supreme Court that defendant was suffering from Multiple Personality
23 Disorder was). An external impediment could be "that the factual or legal basis for a claim
24 was not reasonably available to counsel, or that 'some interference by officials' made
25 compliance impracticable." Id. (quoting, Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct.
26 2639, 2645 (1986)); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
27 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

28 The Nevada Supreme Court has held that, "appellants cannot attempt to manufacture

1 good cause.” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a
2 “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at
3 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), superseded
4 by statute as recognized by, Huebler, 128 Nev. at 197, n.2, 275 P.3d at 95 n.2). Excuses
5 such as the lack of assistance of counsel when preparing a petition as well as the failure of
6 trial counsel to forward a copy of the file to a petitioner have been found not to constitute
7 good cause. See Phelps v. Dir. Nev. Dep’t of Prisons, 104 Nev. 656, 660, 764 P.2d 1303,
8 1306 (1988), superseded by statute as recognized by Nika v. State, 120 Nev. 600, 607, 97
9 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

10 Petitioner cannot demonstrate good cause because all the facts and law necessary to
11 raise these claims were available at the appropriate time. Nor does Petitioner attempt to
12 establish an impediment external to the defense. Petitioner appears to attempt to satisfy his
13 burden to demonstrate good cause by arguing that he is raising the same argument in federal
14 court and that his prior habeas counsel was ineffective for not raising the complaints found
15 in this Petition. Neither of these contentions establish good cause. Federal litigation is
16 irrelevant to the Nevada procedural rules. Colley v. Warden, 105 Nev. 235, 236, 773 P.2d
17 1229, 1230 (1989). Further, Petitioner did not have the right to the effective assistance of
18 post-conviction counsel during the previous round of habeas litigation so even if prior post-
19 conviction counsel was ineffective it still fails to establish good cause. Halbert v. Michigan,
20 545 U.S. 605, 610, 125 S.Ct. 2582, 2587 (2005) (The right of assistance of counsel extends
21 only to “first appeals as of right ... however, ... a state need not appoint counsel ... in
22 discretionary appeals”); Brown v. McDaniel, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014);
23 McKague v. Whitley, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996) (“no right to effective
24 assistance of counsel, let alone any constitutional or statutory right to counsel at all, [exists
25 in] post-conviction proceedings”). Indeed, in Brown, the Nevada Supreme Court directly
26 said that “[w]e have consistently held that the ineffectiveness of post-conviction counsel in a
27 noncapital case may not constitute ‘good cause’ to excuse procedural defaults.” Brown, 130
28 Nev. at 569, 331 P.3d at 870.

1 **III. AS PETITIONER HAS NOT DEMONSTRATED GOOD CAUSE TO**
2 **IGNORE HIS PROCEDURAL DEFAULT, THE COURT NEED NOT REACH**
3 **PETITIONER’S ARGUMENT REGARDING THE SUBSTANTIAL PREJUDICE**
4 **NECESSARY TO IGNORE HIS PROCEDURAL DEFAULTS.**

5 To establish prejudice “a petitioner must show that errors in the proceedings
6 underlying the judgment worked to the petitioner’s actual and substantial disadvantage.”
7 State v. Huebler, 128 Nev. 192, 196-197 275 P.3d 91, 94-95 (2012), cert. denied, 568 U.S.
8 1147, 133 S.Ct. 988 (2013). Further, a finding of prejudice sufficient to disregard the
9 procedural bars must be based upon prejudice sufficient to support a finding of ineffective
10 assistance of counsel. Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997)
11 (error which rises to the level of ineffective assistance of counsel establishes cause and
12 prejudice under NRS 34.810(1)(b)).

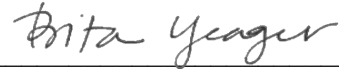
13 Petitioner argues that trial counsel was ineffective in addressing voluntary
14 manslaughter. Specifically, he alleges that counsel failed to “identify the required
15 provocation for voluntary manslaughter” and needed to explain what happened in the room
16 between White and Lucas instead of presenting “the presence of Averman as a ‘sudden and
17 provoking injury[.]” Petition, at 7, 14-15. While this Court does not find it necessary to reach
18 the argument regarding substantial prejudice, this Court notes that the complaints attack
19 virtually unchallengeable strategic decisions. Doleman v. State, 112 Nev. 842, 848, 921
20 P.2d 278, 280-281 (1996); Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 168 (2002).

21 This Court understands that the Petitioner is urging the Court to consider the U.S.
22 Supreme Court’s decision in Martinez v. Ryan, 566 U.S. 1 (2012) in light of the recent
23 decision in Shinn v. Ramirez, 142 S. Ct. 1718 (2022) that additionally restricts a prisoner’s
24 ability to rely on new evidence to raise new ineffective trial counsel claims in a federal
25 habeas petition, and grant relief in the form of an evidentiary hearing on the ineffective
26 assistance of counsel claims. However, this Court is bound by the statutes and controlling
27 law in Brown v. McDaniel, 130 Nev. 565, wherein the Nevada Supreme Court expressly
28 rejected adopting the rule fashioned under Martinez v. Ryan, 566 U.S.1 (2012), as it “ . . .

1 conflict[s] with the current statutory post-conviction scheme, impose[s] significant costs, and
2 undermine[s] the finality of judgments of conviction.” Brown, at 576.
3

4 IT IS THEREFORE ORDERED, that Defendant’s Petition for Writ of Habeas Corpus
5 (Post-Conviction), shall be, and it is DENIED.

6 Dated this 16th day of March, 2023

7 

8 6AB F45 6D34 AC93
9 Bita Yeager
10 District Court Judge
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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Troy White, Plaintiff(s)

CASE NO: A-22-859004-W

7 vs.

DEPT. NO. Department 1

8 Calvin Johnson, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

14 Service Date: 3/16/2023

15 Steven Wolfson

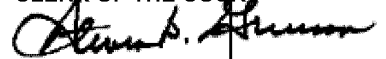
motions@clarkcountyda.com

16 Jonathan Kirshbaum

Jonathan_Kirshbaum@fd.org

17
18 laura barrera

laura_barrera@fd.org



1 NEOJ

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

4
5 TROY WHITE,

6 Petitioner,

Case No: A-22-859004-W

Dept. No: I

7 vs.

8 CALVIN JOHNSON,

9 Respondent,

NOTICE OF ENTRY OF ORDER

10
11 **PLEASE TAKE NOTICE** that on March 16, 2023, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed
15 to you. This notice was mailed on March 20, 2023.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

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18
19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 20 day of March 2023, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:

23 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:

25 Troy White # 1143868
P.O. Box 650
26 Indian Springs, NV 89070

Rene L. Valladares
Federal Public Defender
411 E. Bonneville, Ste 250
Las Vegas, NV 89101

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk