IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY WHITE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 86406

RESPONDENT'S ANSWERING BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY WHITE, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 86406

RESPONDENT'S ANSWERING BRIEF

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

ROUTING STATEMENT

Pursuant to the Nevada Rules of Appellate Procedure 17(b)(2)(A), the Nevada Supreme Court may assign this case to the Court of Appeals because it is an appeal from a judgment of conviction based on a Category A Felony. NRAP 17(b)(2)(A).

STATEMENT OF THE ISSUES

I. Appellant's Claims Are Procedurally Barred.

II. Whether Brown v. McDaniel, 130 Nev. 565, 331 P.3d 867 (2014). Should Not Be Overruled Based On Shinn v. Ramirez, 142 S. Ct. 1718 (2022).

III. Even If This Court Overrules Brown, Appellant Cannot Demonstrate Good Cause And Actual Prejudice.

STATEMENT OF THE CASE

On April 13, 2021, after adjudicating Appellant's first Petition for Writ of Habeas Corpus, the district court filed a Findings of Fact, Conclusions of Law and Order. 9AA1796-1819. The Statement of the Case from this filing is as follows:

> On December 12, 2012, Appellant Troy White (hereinafter "Appellant") was charged by way of Information with the following counts: Count 1: BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony – NRS 205.060); Count 2: MURDER WITH USE OF A DEADLY WEAPON (Category B A Felony – NRS 200.010, 200.030, 193.165); Count 3: ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 4: CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony – NRS 202.350(1)(d)(3)); and Counts 5, 6, 7, 8, and 9: CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony – NRS 200.508(1)).
>
> On February 4, 2013, Appellant filed a pre-trial Petition for Writ of Habeas Corpus, to which the State filed a Return on March 19, 2013. On March 27, 2013, the district court granted Appellant's Petition as to Count 1 only and denied the Petition to Counts 2 through 9. The State filed a Notice of Appeal that same day.
>
> On August 8, 2014, the Supreme Court filed an Order affirming the district court's dismissal of Count 1, holding that a person cannot burglarize his own home. On March 24. 2015, the State filed an Amended Information with the following charges: Count 1: MURDER WITH USE OF A DEADLY WEAPON (Category B A Felony – NRS 200.010, 200.030, 193.165); Count 2: ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.010, 200.030, 193.330,

193.165); Count 3: CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony – NRS 202.350(1)(d)(3)); and Counts 4, 5, 6, 7, and 8: CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony – NRS 200.508(1)).

Jury trial began on April 6, 2015, and concluded on April 17, 2015. The State also filed a Second Amended Information on April 6, 2015, charging the same counts as listed in the Amended Information. On April 17, 2015, the jury returned a verdict as follows: as to Count 1, Guilty of Second Degree Murder with Use of a Deadly Weapon; as to Count 2, Guilty of Attempt Murder with Use of a Deadly Weapon; as to Count 3 Guilty of Carrying a Concealed Firearm or Other Deadly Weapon; and as to Counts 4, 5, 6, 7, and 8, Guilty of Child Abuse, Neglect, or Endangerment.

Appellant was sentenced on July 20, 2015, as follows as to COUNT 1, to LIFE with the eligibility for parole after serving a MINIMUM of TEN 10 YEARS plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; as to COUNT 2 to a MAXIMUM of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon CONSECUTIVE to COUNT 1; as to COUNT 3 to a MAXIMUM of FORTY-EIGHT (48) MONTHS with a MINIMUM Parole Eligibility of NINETEEN (19) MONTHS CONCURRENT WITH COUNTS 1 & 2; as to COUNT 4 to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS CONSECUTIVE TO COUNTS 1 & 2; as to COUNT 5 to a MAXIMUM of SIXTY (60) MONTHS

with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS CONCURRENT with ALL OTHER COUNTS; as to COUNT 6 to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS CONCURRENT with ALL OTHER COUNTS; as to COUNT 7 to a MAXIMUM of SIXTY (60) MONTHS with a 11 MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS CONCURRENT with ALL OTHER COUNTS; as to COUNT 8 to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS CONCURRENT with ALL OTHER COUNTS; with ONE THOUSAND EIGHTY-EIGHT DAYS (1088) DAYS credit for time served. 9AA1798. The AGGREGATE TOTAL sentence was LIFE with a MINIMUM OF THIRTY-FOUR (34) YEARS. The Judgment of Conviction was filed July 24, 2015, but an Amended Judgment of Conviction was filed February 5, 2016, removing the aggregate sentence total language.

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

On April 24, 2018, Appellant filed a post-conviction Petition for Writ of Habeas Corpus. On December 20, 2018, Appellant filed a Supplemental Brief in Support of his Petition for Writ of Habeas Corpus and Motion for Authorization to Obtain Expert and for Payment of Fees Incurred Herein. The State filed its Response to Appellant's Supplemental Petition and Opposition to the Motion for Authorization to Obtain Expert and for Payment of Fees Incurred on March 26, 2019. On April 24, 2019, Petition filed his Reply and Motion for Authorization to Obtain Investigator and Payment of Fees Incurred Herein. The State files in Opposition on May 2, 2019. The district court granted the Motion for an

> Investigator on June 12, 2019. The Order was filed on June 21, 2019.
>
> On September 2, 2020, the district court denied the Motion in part as to the cell phone and ordered a limited evidentiary on the remaining issues—specifically whether counsel was ineffective for failing to investigate the cell phone. 10AA1891. On March 4, 2020, the district court held an evidentiary hearing where Appellant's prior counsel, Scott Coffee Esq., testified regarding his investigation of Appellant's cell phone. Following the evidentiary hearing, the district court denied the Petition entirely.

9AA1796-99. The Notice of Entry of Findings of Fact, Conclusions of Law and Order was filed on April 15, 2021. 9AA1795.

On April 16, 2021, Appellant filed a Notice of Appeal. 10AA1891. On March 1, 2022, the Nevada Supreme Court issued its Order affirming the denial of Appellant's Postconviction Petition for a Writ of Habeas Corpus. Remittitur issued on March 1, 2022. 10AA1891.

On September 27, 2022, Appellant filed a second Petition for Writ of Habeas Corpus as well as a Motion for the Court to Take Judicial Notice of the Filings in Appellant's Criminal Case Number. 10AA1891. On November 15, 2022, the State filed its Response To Appellant's Supplement To Petition For Writ Of Habeas Corpus (Post-Conviction), and on February 15, 2023, Appellant filed its Reply To The State's Response To Appellant's Petition For Writ Of Habeas Corpus (Post-Conviction). 10AA1891. On March 16, 2023, the District Court denied the petition

on procedural grounds and that Appellant could not establish good cause to overcome the procedural bars. 10AA1888-99.

Notice of entry was issued March 20, 2023. 10AA1987. Appellant filed Notice of Appeal on April 12, 2023.[1]

STATEMENT OF THE FACTS

In sentencing Appellant on July 20, 2015, the district court relied on the following factual synopsis contained in Appellant's Supplemental Pre-Sentencing Investigation Report filed August 3, 2015:

> On July 27, 2012, Las Vegas Metropolitan Police Department officers were dispatched to local residence regarding a shooting. Upon arrival officers observed a female later identified as victim #1 (VC2226830) lying on the floor in a bedroom in the residence Victim #1 was unconscious and had an apparent gunshot wound to her chest. A male later identified as victim #2 (VC2226831) was lying on the floor outside the doorway to the bedroom and he also had apparent gunshot wounds. Five children later identified as nine-year-old minor victim #3 (VC2226832), five-year-old minor victim #4 (VC2226833), eight-year-old minor victim #5 (VC2226834), six-month-old minor victim #6 (VC2226835), and two-year-old minor victim #7 (VC2226836) were also present in the house.
>
> Medical personnel responded and transported victim #1 and victim #2 to a local trauma hospital. Officers later learned that victim #1 arrived at the hospital and after attempts to revive her, she was pronounced dead. Victim #2 underwent surgery to treat his injuries.

[1] Appellant did not include his instant Notice of Appeal within his 10-volume appendix in violation of Rule 30(b)(2)(J)(iv).

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

In June 2012, victim #1 and Appellant separated, and Appellant moved out of the family home. However, when Appellant exercised his visitation on the weekends, he would stay in the home and victim #1 would stay elsewhere.

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

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

After shooting victim #2, Appellant stood over him and showed him the gun. Appellant told victim #2 that he was going to jail, and he was going to kill him. Appellant also asked victim #2, “How does it feel now?” As victim #2 lay

> on the floor, Appellant kept coming into the residence to threaten him. Appellant finally left the residence and victim #2 heard a car leave.
>
> Once Appellant fled the scene, minor victim #3 ran to a neighbor's house to call for police.
>
> Later that date, Appellant turned himself in at the Yavapai County Sheriff's Department in Arizona. Upon being questioned, Appellant reported that he was wanted in the Las Vegas area for shooting someone. He stated that he fled in the vehicle that was now parked in the sheriff's department lot. Appellant further stated the gun he used to shoot people in the Las Vegas area was inside the vehicle in the spare tire compartment area.
>
> On August 10, 2012, Appellant was extradited back from Arizona and booked accordingly at the Clark County Detention Center.

9AA1799-1801.

SUMMARY OF THE ARGUMENT

First, the District Court properly dismissed the Second Petition as procedurally barred. Appellant's Ground One was appropriate and available for direct appeal. Since he did not raise Ground One on direct appeal, it is waived. The Second Petition is time-barred because it was not filed until September 27, 2022. This was over five years after remittitur issued from Appellant's direct appeal on May 22, 2017, and over four years after his one-year deadline to file a habeas petition. The State effectively pleads laches because the State is prejudiced in its ability to respond to the petition due to the passage of time since Appellant's trial.

Appellant's petition is an abuse of writ because he raises a new ground for relief in a successive habeas petition.

Second, Brown v. McDaniel, 130 Nev. 565, 331 P.3d 867 (2014), should not be overruled in light of the Supreme Court's recent decision in Shinn v. Ramirez, 142 S. Ct. 1718 (2022). The Nevada Supreme Court has consistently held that there is no right to assistance of post-conviction counsel for noncapital prisoners. Brown 130 Nev. at 569, 331 P.3d at 870; McKague v. Whitley, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996). Further, even if Appellant had a right to effective post-conviction counsel, his allegations of ineffectiveness thereof are also procedurally barred.

Third, even if this Court overrules Brown, Appellant cannot demonstrate good cause and actual prejudice to overcome the procedural bars. Appellant fails to explain why the new evidence in his declaration would not have been reasonably available earlier in his case. Additionally, post-conviction counsel was effective in raising five grounds during Appellant's first habeas proceeding. Appellant cannot demonstrate prejudice by his trial counsel because trial counsel made specific strategic decisions and accurately stated the law on voluntary manslaughter. Therefore, this Court should affirm the District Court's denial of Appellant's Second Petition.

/ / /

ARGUMENT

This Court reviews the district court's application of the law de novo and gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. However, a district court's factual findings will be given deference by this Court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). While this Court gives deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous, this Court reviews the district court's application of the law to those facts de novo. Id.

I. APPELLANT'S CLAIMS ARE PROCEDURALLY BARRED.

a. Application of the Procedural Bars is Mandatory.

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

The district courts have *a duty* to consider whether post-conviction claims are procedurally barred. State v. Eighth Jud. Dist. Ct. (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). Riker held that the procedural bars "cannot be ignored when

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

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

The district courts have zero discretion in applying procedural bars because to allow otherwise would undermine the finality of convictions. In holding that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," the Riker Court noted:

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

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

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

> At some point, we must give finality to criminal cases. Should we allow [petitioner's] post-conviction relief proceeding to go forward, we would encourage defendants to file groundless petitions for federal habeas corpus relief, secure in the knowledge that a petition for post-conviction relief remained indefinitely available to them. This situation would prejudice 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.

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

b. Appellant's Substantive Claims Are Waived for Failure to Raise on Direct Appeal

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

Appellant claims he was denied his right under the Sixth and Fourteenth Amendments to the United States Constitution to effective trial counsel. Appellant's Opening Brief (hereinafter "AOB") at 2. Appellant claims since the evidence presented at trial supported a theory of voluntary manslaughter and defense counsel put forth an untenable argument for voluntary manslaughter, Appellant's trial

counsel was ineffective. AOB at 34-42. Appellant's complaint is barred as waived. Appellant's claim was available for direct appeal, and therefore, cannot be considered by this Court. Thus, Appellant's substantive claim is waived for failing to raise it on direct appeal.

c. Appellant's Second Petition is Time Barred.

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

Remittitur issued from Appellant's direct appeal on May 25, 2017. 9AA1799. Therefore, Appellant had until May 22, 2018, to file a timely habeas petition. Appellant filed the second petition on September 27, 2022. 10AA1828. As such, this second Petition is timed barred.

/ / /

d. The State Affirmatively Pleads Laches.

NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." See also Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final."). To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2).

More than five years has passed since remittitur issued from Appellant's direct appeal on May 22, 2017. 9AA1773. As such, the State pleads statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1) against the Second Petition, which was not filed until September 27, 2022. After such a passage of time, the State is prejudiced in its ability to answer the Second Petition because the State will be forced to track down witnesses who may have died or retired in order to prove a case

that is several years old. Assuming witnesses are available, their memories will have certainly faded and will not present to a jury the same way they did in 2015.

e. Appellant's Second Petition is Barred as an Abuse of Writ.

Appellant's Second Petition is procedurally barred because it is an abuse of the writ. NRS 34.810(2) reads:

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

(emphasis added).

Second or successive petitions are petitions that either (1) fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that (2) allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for

relief in the first instance should weigh against consideration of the successive motion.").

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive, and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Appellant's repeated filings of petitions creates the very issue that the Nevada Supreme Court addressed in Lozada. Appellant's prior petition has been denied, yet Appellant's continual filing of pleadings serves only to "clog the court system and undermine the finality" of his conviction. Lozada, 110 Nev. at 358, 871 P.2d at 950. Raising a new ground for relief in successive habeas petition is an abuse of writ.

Therefore, this Court should affirm the District Court's denial of Appellant's Second Petition.

II. BROWN SHOULD NOT BE OVERRULED.

Appellant claims that the Nevada Supreme Court's decision in Brown was wrong and should be overturned. AOB at 25. Appellant is incorrect.

The Nevada Supreme Court has repeatedly held that "'[w]e are loath to depart from the doctrine of stare decisis' and will overrule precedent only if there are compelling reasons to do so." City of Reno v. Howard, 130 Nev. 110, 113-14, 318 P.3d 1063, 1065 (2014) (quoting Armenta-Carpio v. State, 129 Nev. 531, 398, 306 P.3d 395, 398 (2013))." Appellant's failure to meaningfully address this standard is fatal to his demand to overrule Brown. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). "Vertical stare decisis is absolute and requires" the district court to adhere to Nevada Supreme Court precedent. See United States v. Guillen, 995 F.3d 1095, 1114 (10th Cir. 2021). Once the Nevada Supreme Court "has adopted a rule, standard, or interpretation, [the district court] must use that same rule, standard, or interpretation in later cases." See id.

Under Nevada state law, a petitioner has no constitutional right to post-conviction counsel and a petitioner cannot rely on ineffective assistance of post-

conviction counsel to excuse his procedural defaults. Brown, 130 Nev. at 569, 331 P.3d at 870; McKague, 112 Nev. at 164-65, 912 P.2d at 258; Chappell v. State, 501 P.3d 935, 137 Nev. Adv. Op. 83 (2021).

A federal habeas court may hear a substantial claim of ineffective assistance of trial counsel even if that same claim is barred under state law requiring that claims of ineffective assistance of trial counsel be raised in an initial-review collateral proceeding if there was no counsel or counsel in that proceeding was ineffective. Martinez v. Ryan, 566 U.S. 1, 17-18, 132 S. Ct. 1309, 1320-21 (2012). The Nevada Supreme Court held that Martinez only addressed whether an ineffective assistance of counsel claim may provide good cause for procedural default in *federal habeas proceedings*, but not in state court proceedings. Brown, 130 Nev. at 569; 331 P.3d at 870.

The Nevada Supreme Court expressly rejected adopting the rule fashioned under Martinez, as it "conflict[s] with the current statutory post-conviction scheme, impose[s] significant costs, and undermine[s] the finality of judgments of conviction." Brown, 130 Nev. at 576, 331 P.3d 875. By distinguishing Martinez, this Court held "[o]ur case law clearly forecloses Brown's contention. We have consistently held that the ineffective assistance of post-conviction counsel in a noncapital case may not constitute "good cause" to excuse procedural defaults. This is because there is no constitutional or statutory right to the assistance of counsel in

noncapital post-conviction proceedings, and 'where there is no right to counsel there can be no deprivation of effective assistance of counsel.'" Brown, 130 Nev. at 569, 331 P.3d 870 (quoting McKague, 112 Nev. at 164-165, 912 P.2d at 258).

Appellant fails to cite any relevant legal authority to support his claim to overturn Brown. Appellant cites Martinez and Shinn v. Ramirez, 142 S. Ct. 1718, 212 L.Ed.2d 713 (2022), but they do not support his argument. As shown, Martinez is irrelevant to this case because Appellant is in state court, not in federal habeas proceeding. Appellant contends that the Nevada Supreme Court should give due regard to Martinez. AOB at 33. It is unclear *how* Appellant believes this is grounds for overruling Brown, as the Brown Court clearly analyzed Martinez, then extensively outlined the distinctions between the cases and between the procedural rules governing each. Brown, 130 Nev. at 570-75, 331 P.3d 870-74 (distinguishing between the principles underlying the federal procedural default doctrine and state procedural bars).

Shinn also does not support Appellant's case. In Shinn, the U.S. Supreme Court refused to expand Martinez and reaffirmed that "there is no constitutional right to counsel in state postconviction proceedings." Shinn, 142 S. Ct. at 1737, 212 L.Ed.2d 713. The Court in Shinn also held that a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond state-court record based on ineffective assistance of state post-conviction counsel. Id.

Appellant claims this Court should reconsider Brown because Oregon and Pennsylvania courts cited Shinn in decisions holding for a habeas petitioner. AOB at 33-34. However, neither of the cited cases declare a change in procedure or announce a new rule as Appellant is asking this Court to do. In the Oregon case, ineffective assistance of counsel was not the issue before the court, but rather whether petitioner had a right to be present at a certain hearing, and held that following state statute, petitioner had a right to be present since his presence could have impacted the outcome of the hearing. Frost v. State, 320 Or. App. 753, 754, 761, 514 P.3d 1182, 1185, 1189 (2022). The Pennsylvania case merely stands for the proposition that the court is aware of the Shinn decision and the importance of state court proceedings to an appellant. Commonwealth v. Debois, 281 A.3d 1062, 1063 fn. 6 (Pa. Super. Ct. 2022).

Additionally, a recent case from the Supreme Court of Nevada affirms it "has rejected calls for equitable tolling of the filing period as set forth in NRS 34.726." Pitrello v. State, 508 P.3d 855, 2022 WL 1301727, 2 (2022) (unpublished opinion) (citing Brown, 130 Nev. at 565, 331 P.3d at 867). The United States District Court of Nevada also recently acknowledged that "Nevada Supreme Court does not recognize Martinez as cause to overcome a state procedural bar under Nevada state law." Miller v. Olsen, 2023 WL 362692, at 3 (2023) (citing Brown, 130 Nev. 565, 331 P.3d 867). Both cases cite Brown as authoritative precedent. Thus, Appellant

fails to cogently argue and support his claim with relevant legal authority and this claim was properly denied.

Brown reviewed Nevada's procedural default statutes and decided Martinez did not invalidate the implementation of those statutes. Brown, 130 Nev. at 575, 331 P.3d at 874. The same analysis applies to Shinn, and the answer should be the same. Whether there should be a statutory right to the effective assistance of counsel in non-capital proceedings is a question for the Nevada Legislature. This Court is bound by the law as it currently exists. Post-conviction counsel is not a constitutional or statutory right. McKague, 112 Nev. at 164-165, 912 P.2d at 258.

Appellant's argument disregards precedent and the legislative intent behind the procedural bars of NRS 34. Therefore, Brown should not be overruled.

III. EVEN IF THIS COURT OVERRULES BROWN, APPELLANT CANNOT DEMONSTRATE GOOD CAUSE AND PREJUDICE.

To overcome the procedural bars, Appellant must demonstrate: (1) good cause for delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). Appellant first claims he can overcome procedural bars and show good cause because his post-conviction counsel failed to raise Ground One. AOB at 34-35. Appellant then claims he can show prejudice because, according to Ground One, trial counsel was ineffective for failing to properly argue for voluntary manslaughter. Id. at 35.

a. Appellant Cannot Establish Good Cause Because His Post-Conviction Counsel Was Not Ineffective for Not Raising Ground One.

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003), rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S. Ct. 358 (2004); see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules"); Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician's declaration in support of a habeas petition were sufficient "good cause" to overcome a procedural default, whereas a finding by Supreme Court that a defendant was suffering from Multiple Personality Disorder was). An external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)). See also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n.4 (1998)).

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

Appellant cannot demonstrate good cause because all the facts and law necessary to raise this claim were available at the appropriate time. Nor does Appellant attempt to establish an impediment external to the defense. Appellant's initial post-conviction counsel alleged five claims of ineffective assistance of counsel and even had a hearing on the matter where trial counsel testified. 8AA1602-17; 9AA1755-69. As explained in Part III.b *infra*, trial counsel was not ineffective in his voluntary manslaughter theory. Appellant had ample opportunity to raise the instant Ground One and failed to do so.

Appellant's post-conviction counsel effectively represented Appellant, and therefore, Appellant cannot show good cause to overcome procedural bars.

b. Appellant Was Not Prejudiced by His Trial Attorney Because All Avenues for Addressing the Specific Provocation That Could Support Voluntary Manslaughter Were Exhausted in Trial; Therefore, Ground One Does Not Have Merit

"A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001) (emphasis added). To demonstrate prejudice to overcome the procedural bars, a defendant must show "not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065. "Strategic choices

made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . .

Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed."

In Nevada, voluntary manslaughter is "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." NRS 200.050. "The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder." NRS 200.060.

Appellant's trial attorney presented evidence that could support a case for voluntary manslaughter by focusing on the events surrounding a conversation between Appellant and Echo Lucas. Appellant's post-conviction counsel was not ineffective for not raising Appellant's Ground One. There was no claim for under this theory for Appellant's post-conviction counsel to raise. The claim that trial counsel's defense theory was inadequate because it contradicted Nevada law and left essential questions unanswered is belied by the record. At trial, Appellant's counsel repeatedly attempted to elicit information from the witnesses about the alleged provoking incident between Appellant and Echo. Trial counsel cross-examined the

three witnesses to the alleged provoking incident: Jayce G., Jodey G., and Joe Averman.

Cross-Examination of Jayce G.:

> Q: And they were in the back bedroom, this third bedroom for a while, and the noise started to come up? You could hear a commotion back there; is that fair?
> A: Like I heard it when they came out of the bedroom.
> Q: Okay. You heard a fight?
> A: *Yeah. Not a fight, but like I heard them raising their voices at each other*.
> Q: Okay. They were talking. *You'd heard an argument at that point.* You said you saw your father with a gun in his hand?
> A: *Yes, I did*.

3AA502 (discussing the alleged provoking incident) (emphasis added).

Re-Cross-Examination of Jayce G.:

> Q: He did come in and ask to talk to your mother?
> A: Yes.
> Q: And they went in the back bedroom and *they started talking and then it escalated. Yes?*
> A: *Yes.*

4AA535 (emphasis added).

Cross-Examination of Jodey G.:

> Q: Any you told the officers when your father came in that day he was nice and mellow, at least at the start? Yes?
> A: Yes.
> Q: *And then at some point things escalated inside the house. Is that fair?*
> A: *Yes.*
> Q: And I used one of those big words again, but you know what I mean by escalated, right?

A: Yes.
Q: *It got worse, but it didn't start that way. Is that fair?*
A: *Yes.*
. . .
Q: You said you heard some words from the room; that you dad had come in mellow and went to the back room, and is that where the argument started in the back room?
A: Yes.
Q: *And you heard your mother say something like, No or I'll leave Joe, something like that?*
A: *Yes.*
Q: *Did the shots happen fairly quickly after that?*
A: *Yes.*
Q: And I know you didn't have a stopwatch, but within a matter of a minute or a few seconds? What can you tell us, how quickly?
A: I can't recall.
Q: Okay. It certainly wasn't an hour. That's fair, right?
A: It wasn't an hour. Yes.

4AA580-81, 84-85 (discussing the alleged provoking incident) (emphasis added).

Cross-Examination of Joe Averman:

Q: Okay. *We can agree he wasn't openly agitated; fair?*
A: *Fair.*
Q: Now, he didn't make any threats to when he came in the house; correct?
A: Correct.
Q: And he didn't make any threats to Echo, either; correct?
A: Correct.
Q: And you didn't see a gun; right?
A: I did not.
. . .
Q: And they talk -- or you assume they talk. They're in the bedroom for about five minutes; right?
A: Correct.
Q: And today you said it was a few minutes. I think you've testified previously five minutes is the best estimate you could give. Is that accurate?

A: Correct.
Q: *At first it starts calm; is that fair?*
A: *Correct.*
Q: *As far as you know, they're just talking, there's no indication of trouble at least at first; is that fair?*
A: *Yes.*
Q: You didn't hear very much of what was going on, if anything; is that fair?
A: Yes.
Q: *So it doesn't start as a fight in that room; fair characterization?*
A: *Yes.*
Q: *But it escalates at some point; yes?*
A: *Yes.*
Q: And when it escalates is when you get concerned?
A: Yes.
Q: *You become alarmed when you hear Echo say something; yes?*
A: *Yes.*
Q: That's really the first point you become alarmed that something may be happening in that room; yes?
A: Yes.
Q: And, correct me if I get this wrong, but I think what was said or what you've testified was said was, Troy, no, please don't, and then, stop. Does that sound accurate?
A: Correct.
Q: And as far as being concerned, that's what -- that's what draws your concern; yes?
A: Yes.
Q: *And you don't know what the conversation was up to that point; correct?*
A: *No.*
Q: *And you don't know exactly what was said, obviously.*
A: *No.*

6AA1077, 87-89 (discussing the alleged provoking incident) (emphasis added).

Appellant's trial counsel attempted to answer the essential questions left unanswered. However, there are only two people who know exactly what was said

between Appellant and Echo—the Appellant who decided not to testify and his deceased victim. If Appellant wanted the alleged provoking incident to be considered completely by the jury, Appellant should have testified at trial. What other way could this information have come in? Every other witness who could have known what was said in the craft room testified that they did not know exactly what happened, only that they knew there was an escalation between Appellant and Echo.

Following Appellant's conviction and first post-conviction petition, Appellant filed a declaration with information that he could have introduced at trial if he testified, because again, how else would this information have been introduced? 10AA1821-22. Trial counsel could not force Appellant to testify. No one other than Appellant could have testified to Appellant's "dissociative state" and jumbled memory after killing Echo. Trial counsel did not prejudice Appellant by not introducing this evidence because without Appellant's testimony, this information could not have been introduced at trial.

Furthermore, in trial counsels' opening statement and closing argument, they repeatedly refer to the alleged provoking incident. See 3AA471; 8AA1497, 1513, 18-19, 22-23. During trial counsel's closing, he stated:

> And what do they do in the back bedroom? Do they start yelling immediately? No. They talk, right. Averman says it, the kids say it. It starts as a talk, and it escalates. It escalates.

8AA1519.

> When you read the instructions, you've got a highly provoking injury, it's a sudden quarrel, he went into the house quietly. He went into the house quietly. It is a sudden quarrel. Who would not be provoked by Averman coming out of the bedroom in your house to interject himself? Who wouldn't be provoked by that? It is manslaughter.

8AA1523.

Where is the contradiction to Nevada law? Appellant is correct in stating that Appellant's trial counsel asked for an instruction on prolonged provocation. AOB at 38; 8AA1443. However, that statement was not made in front of the jury, the jury was not instructed on this theory, nor did trial counsel rely solely on that theory. As stated above, trial counsel attempted to support the theory of adequate provocation under Nevada law with the testimony and evidence available at trial. Counsel's decision to focus on Joe Averman entering the conversation instead of the conversation between Appellant and Echo was strategic. What was said between Appellant and Echo was never presented at trial, so trial counsel made the decision to focus more on Averman being the provocation, not the conversation. This is a clear strategic decision by trial counsel that was made after over a week of testimony and evidence in trial. Trial counsel did not perform deficiently by not focusing on the conversation between Appellant and Echo, as he was still able to present a cogent, comprehensive theory of voluntary manslaughter through his strategic decision.

The record is clear that the jury knew there was some type of escalation between Appellant and Echo. Regardless of knowing that there may have been some event that set Appellant off, the jury found that heat of passion and sufficient provocation did not exist.

The State presented evidence to support the conviction of second-degree murder. See i.e., 7AA1294-1320 (testimony on the threatening and harassing text messages sent from Appellant to Echo). The jury was properly instructed on voluntary manslaughter and the jury found Appellant guilty of second-degree murder. The record does not reflect that there is a reasonable probability that at least one juror would have chosen voluntary manslaughter.

Trial counsel was effective, and Appellant is not entitled to relief.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the District Court's denial of Appellant's Second Petition.

Dated this 26th day of September, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 7,590 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of September, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 26, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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