

No. 86406

IN THE NEVADA SUPREME COURT

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Elizabeth A. Brown
Clerk of Supreme Court

Troy White,

Appellant,

v.

State of Nevada, et al.,

Respondents.

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

Petitioner-Appellant's Reply Brief

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NRAP 26.1 DISCLOSURE

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

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

/s/ Laura Barrera

Laura Barrera

Assistant Federal Public Defender

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ARGUMENT

Troy White filed a second successive state post-conviction petition on September 27, 2022.¹ In it, he raised one claim of ineffective assistance of trial counsel based on trial counsel's failure to present a legally and factually viable argument to support the defense theory that White was guilty of only voluntary manslaughter, not first- or second-degree murder.² White argued he had good cause to overcome the procedural bars to this petition due to his post-conviction counsel's ineffectiveness.

The district court denied the petition on procedural grounds, finding that the petition was procedurally barred, and that White could not establish good cause to overcome those bars.³ The court relied on this Court's decision in *Brown v. McDaniel*, 130 Nev. 565 (2014) to hold that ineffectiveness of post-conviction counsel in a non-capital case may not constitute good cause. *Id.* at 569. The court did not reach the issue of prejudice to White due to the finding that White could not establish good

¹ X.App.1828-1848.

² X.App.1828-1848.

³ X.App.1888-1899.

cause to overcome the procedural bars.⁴

White argues that the time is ripe for this Court to overrule *Brown* and determine that ineffectiveness of post-conviction counsel can constitute good cause. If this Court does so, White can overcome the procedural bars to this petition. In their answering brief, Respondents argue that *Brown* should not be overruled and that, even if it was, White could not prevail. However, their arguments are unpersuasive.

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

This Court held in *Brown v. McDaniel*, 130 Nev. 565 (2014) that ineffectiveness of post-conviction counsel in a non-capital case may not constitute good cause to overcome procedural bars. *Id.* at 569. As explained in White’s opening brief, this Court should reconsider this issue, and conclude that ineffectiveness of post-conviction counsel can establish good cause.

This Court’s decision in *Brown* stems in part from the U.S. Supreme Court’s decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). The *Brown* Court distinguished the situation in Nevada from the reasoning in *Martinez*,

⁴ X.App.1897.

because 1) there is no constitutional right to counsel in post-conviction proceedings (*Brown*, 130 Nev. at 571, 331 P.3d at 871); 2) the *Martinez* decision interpreted federal procedural rules, not state procedural rules, and did not require states to appoint counsel for non-capital petitioners (*Id.*, 130 Nev. at 571, 331 P.3d at 871-72); and 3) the relevant statutes contemplate a petitioner will file a single post-conviction petition (*Id.*, 130 Nev. at 572-73, 331 P.3d at 872-73). In his opening brief, White argues that none of these distinctions actually support the holding in *Brown*.⁵

This Court should revisit this issue and adopt the U.S. Supreme Court's interpretation of the equitable principles governing procedural default under federal law. As the *Martinez* opinion explains, when a petitioner has a winning trial-counsel-ineffectiveness claim, state courts need to have a process for the petitioner to raise that claim. 566 U.S. at 10-11. These equitable principles are even more compelling today than they were when the *Martinez* decision issued, given the U.S. Supreme Court's recent decision in *Shinn v. Ramirez*, 142 S. Ct. 1718, holding that a federal court is precluded under most circumstances from considering

⁵ OB at 32-33.

new evidence beyond the state court record to support a procedurally defaulted claim on the merits. In this legal landscape, many petitioners with meritorious claims will never have an opportunity in Nevada to have a court consider their claim.

Despite the compelling reasons to overrule *Brown*, Respondents claim that the decision must stand due to stare decisis.⁶ But this Court will “depart from the doctrine of stare decisis where such departure is necessary to avoid the perpetuation of error.” *Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947); see *Armento-Carpio v. State*, 129 Nev. 531, 536, 306 P.3d 395, 398-99 (2013) (citing *Stocks*). For example, in *Armento-Carpio*, the Court departed from stare decisis when a previous decision conflicted with a relevant U.S. Supreme Court decision. 129 Nev. at 535-36, 306 P.3d at 398-99. Here, as explained in the opening brief, this Court should depart from stare decisis. See also *Matter of Estate of Sarge*, 134 Nev. 866, 870, 432 P.3d 718, 722 (2018) (departing from stare decisis in part because the U.S. Supreme Court’s interpretation of a

⁶ AB at 17.

federal procedural rule was “strong persuasive authority” regarding this Court’s interpretation of an analogous state procedural rule).

In addition, applying stare decisis would be fundamentally unfair to non-capital habeas petitioners, in light of the *Shinn* decision, precluding consideration of meritorious claims where a petitioner had the misfortune of having ineffective postconviction counsel, and ineffective trial counsel. The Court should depart from stare decisis when there are “compelling reasons” that are “weighty and conclusive.” *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011). As argued in the opening brief, the good cause exception described in *Martinez* is an essential safeguard that ensures at least one court will review a defaulted but substantial trial-counsel-ineffectiveness claim. But now, under *Shinn*, a federal court cannot consider any new evidence to support that claim.

The reasoning in *Martinez* applies in state court as well. If the Court stands by *Brown*, then the Nevada courts will remain closed to substantial Sixth Amendment claims, simply because the petitioner didn’t have an adequate state post-conviction attorney. Moreover, under *Shinn*, no court will consider whether the prisoner’s right to effective trial counsel was violated if the new claims relies on new evidence. That

would be an unjust result, and the need to avoid such a result is a “compelling” and “weighty” reason why the Court should depart from stare decisis.

In their answering brief, Respondents go on to explain the state of the law, that *Brown* is currently precedent, with a variety of case citations.⁷ White has never disputed that *Brown* is the law; his argument has always been that this Court should reconsider and overturn *Brown* in light of *Shinn*. None of the citations the State champions refute White’s arguments as to why this Court should overturn *Brown*.

II. White demonstrates good cause and prejudice to overcome the procedural bars to this petition.

Post-conviction counsel was ineffective for failing to raise this claim during White’s first habeas proceeding. As such, if this Court overrules *Brown v. McDaniel*, White can show good cause for overcoming the procedural bars to his petition.

⁷ See AB at 19-20.

A. Post-conviction counsel was ineffective for failing to raise Ground One.

In the instant petition, White raises one claim that his post-conviction counsel, Christopher Oram, failed to raise. As argued in the opening brief, White’s post-conviction counsel was ineffective for failing to raise this claim, because it was clear from the record that trial counsel failed to raise a viable theory for voluntary manslaughter, even though such a theory was apparent and supported by the evidence.⁸ This failure directly undermined White’s defense.

The State argues that post-conviction counsel was not ineffective because counsel alleged five claims of ineffective assistance of counsel in the initial post-conviction proceedings and had a hearing on the matter.⁹ This argument fails because the question is not whether post-conviction counsel brought claims, the question is whether post-conviction counsel failed to bring a meritorious claim. *See Martinez*, 566 U.S. at 14 (“[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial

⁸ OB at 34-35.

⁹ AB at 23.

one, which is to say that the prisoner must demonstrate that the claim has some merit.”) The fact that post-conviction counsel brought some non-meritorious claims in the initial habeas proceedings is irrelevant to this appeal.

B. White demonstrates prejudice because Ground One has merit.

The State also argues that White should not prevail because the underlying ineffective assistance of trial counsel claim is not meritorious.¹⁰ Their argument fails. As the State points out, defense counsel elicited testimony from various witnesses about the argument between White and Echo that preceded the shooting.¹¹ The evidence and testimony supported the theory that this argument was the provoking event. Yet defense counsel presented a theory that was not supported by the evidence—that seeing Averman was the provoking event.¹² This was ineffective, and detrimental to White’s defense.

White argued extensively in his opening brief that his claim is

¹⁰ AB at 24.

¹¹ AB at 26-29.

¹² VIII.App.1522-1523.

meritorious, and therefore he can show prejudice. But to the extent this Court finds there are facts in dispute, this Court should remand to the lower court and order an evidentiary hearing.¹³

CONCLUSION

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

¹³ The State also argues that White's claim was waived because it was not raised on direct appeal and that the petition was an abuse of writ. X.App.1893-1895. As to the first point, the State is wrong because this is a claim of ineffective assistance of counsel, and so could not be raised on direct appeal. *Corbin v. State*, 111 Nev. 378, 381 (1995). The State is also wrong on the second point. This is not an abuse of writ, because White shows good cause to excuse the procedural bars, and because the ground has merit. *See Lozada v. State*, 110 Nev. 349, 358 (1994).

Dated October 26, 2023.

Respectfully submitted,

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/s/ Laura Barrera

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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 in Century, 14 point font: or

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

☒ Proportionately spaced. Has a typeface of 14 points or more and contains 1,603 words; or

☐ Does not exceed pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate

Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated October 26, 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 October 26, 2023, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include:

Alexander G. Chen, Jonathan VonBoskerck, and Aaron D. Ford.

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

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