

# Appendix A

# Appendix A

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN DEVON SUTTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75988-COA

**FILED**

MAR 14 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Kevin Devon Sutton appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 9, 2018.<sup>1</sup> Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Sutton filed his petition more than 17 years after issuance of the remittitur on direct appeal on July 9, 2001. *See Sutton v. State*, Docket No. 34165 (Order of Affirmance, June 11, 2001). Sutton's petition was therefore untimely filed. *See* NRS 34.726(1). His petition was also successive.<sup>2</sup> *See* NRS 34.810(2). Sutton's petition was therefore

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<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

<sup>2</sup>*See Sutton v. State*, Docket No. 73651-COA (Order of Affirmance, April 25, 2018); *Sutton v. State*, Docket No. 71025-COA (Order of Affirmance, July 12, 2017); *Sutton v. State*, Docket No. 67584 (Order of Affirmance, December 18, 2015); *Sutton v. State*, Docket No. 65121 (Order of Affirmance, September 18, 2014); *Sutton v. State*, Docket No. 64244 (Order of Affirmance, June 11, 2014); *Sutton v. State*, Docket No. 53466 (Order of Affirmance, January 12, 2010); *Sutton v. State*, Docket No. 40477 (Order of Affirmance, July 8, 2004). Sutton filed a postconviction petition for a writ of habeas corpus on September 16, 2004, that appears has not

procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Further, because the State specifically pleaded laches, Sutton was required to overcome the presumption of prejudice to the State. *See NRS 34.800(2).*

Sutton did not allege he could overcome the procedural bars by demonstrating good cause and actual prejudice. Rather, he attempted to overcome his procedural defects by arguing he is actually innocent such that denying consideration of his substantive claim would result in a fundamental miscarriage of justice. *See Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Sutton argues the district court erred by denying him an evidentiary hearing on the actual-innocence claim. To warrant an evidentiary hearing, Sutton had to raise claims supported by specific factual allegations that, if true and not repelled by the record, would have demonstrated he could overcome the procedural bars. *See Hathaway v. State*, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003). Even assuming Sutton's new evidence is true, it does not show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)) (setting out the test for a gateway claim of actual innocence); *see also Mazzan*, 112 Nev. at 842, 921 P.2d at 922.

Further, Sutton failed to overcome the presumption of prejudice to the State. To do so, he had to demonstrate both a fundamental miscarriage of justice and that he could not have known of the grounds by exercise of reasonable diligence. *See NRS 34.800(1).* Even if he could have demonstrated a fundamental miscarriage of justice, he could not have met

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been resolved and another one on January 5, 2016, from which Sutton did not appeal the district court's denial.

the second requirement. Sutton's underlying substantive claim is that a certain opinion by the Nevada Supreme Court applies to him, but as Sutton acknowledges, that opinion was issued before Sutton's conviction became final. *See Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). Sutton further admits that all of his "new" evidence was available in his discovery and was thus known to him before he entered his guilty plea. For the foregoing reasons, we conclude the district court did not err by denying Sutton's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.



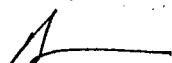
, J.

Tao



, J.

Gibbons



, J.

Bulla

cc: Hon. Susan Johnson, District Judge  
Kevin Devon Sutton  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

# Appendix B

# Appendix B

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN DEVON SUTTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75988-COA

**FILED**

APR 24 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

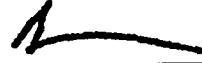
*ORDER DENYING REHEARING*

Rehearing denied. NRAP 40(c).

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Susan Johnson, District Judge  
Kevin Devon Sutton  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk



# Appendix C

# Appendix C

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN DEVON SUTTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75988

**FILED**

JUN 07 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER DENYING PETITION FOR REVIEW*

Review denied. NRAP 40B.<sup>1</sup>

It is so ORDERED.

Pickering, A.C.J.  
Pickering

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

Stiglich, J.  
Stiglich

Cadish, J.  
Cadish

Silver, J.  
Silver

cc: Hon. Susan Johnson, District Judge  
Kevin Devon Sutton  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

<sup>1</sup>The Honorable Mark Gibbons, Chief Justice, did not participate in the decision of this matter.

# Appendix D

# Appendix D

1      **ORDR**

2      STEVEN B. WOLFSON  
3      Clark County District Attorney  
4      Nevada Bar #001565  
5      KRISTA D. BARRIE  
6      Chief Deputy District Attorney  
7      Nevada Bar #10310  
8      200 Lewis Avenue  
9      Las Vegas, NV 89155-2212  
10     (702) 671-2500  
11     Attorney for Plaintiff

12     **DISTRICT COURT**  
13     **CLARK COUNTY, NEVADA**

14     THE STATE OF NEVADA,

15     Plaintiff,

16     -vs-

17     KEVIN SUTTON  
18     # 1500265

19     Petitioner.

20     CASE NO: 96-C-139518-1

21     DEPT NO: XXII

22     **FINDINGS OF FACT, CONCLUSIONS OF**  
23     **LAW AND ORDER**

24     DATE OF HEARING: May 15, 2018

25     TIME OF HEARING: 8:30 A.M.

26     THIS CAUSE having come on for hearing before the Honorable SUSAN JOHNSON,  
27     District Judge, on the 15th Day of May, 2018, the Petitioner not being present, or represented  
28     by counsel, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney,  
1     through VICTORIA VILLEGAS, Chief Deputy District Attorney, and the Court having  
2     considered the matter, including briefs, transcripts, arguments of counsel, and documents on  
3     file herein, now therefore, the Court makes the following findings of fact and conclusions of  
4     law:

5     **PROCEDURAL BACKGROUND**

6     On November 20, 1996, the State filed an Information charging Kevin Sutton  
7     (hereinafter "Defendant") with one count of Murder with Use of a Deadly Weapon.  
8     Thereafter, Defendant entered into negotiations with the State. The State filed an Amended  
9     Information pursuant to those negotiations on February 19, 1999, charging Defendant with

1 First Degree Murder with Use of a Deadly Weapon.

2 On the same day, a Guilty Plea Agreement was filed in open court wherein Defendant  
3 pleaded guilty to the charge as alleged in the Amended Information. In exchange for  
4 Defendant's plea, the State agreed to stipulate to a sentence of 20 years to LIFE in the Nevada  
5 Department of Corrections plus an equal and consecutive sentence of 20 years to LIFE for the  
6 use of a deadly weapon. The State further agreed not to oppose Defendant serving his sentence  
7 in the Texas prison system subject to the approval of the Nevada Department of Prisons and  
8 the Texas Department of Corrections.

9 On April 22, 1999, the District Court sentenced Defendant to the given stipulated  
10 sentence of 20 years to LIFE for the first-degree murder plus an equal and consecutive term  
11 of 20 years to LIFE for the use of a deadly weapon. Defendant received 929 days credit for  
12 time served. Defendant's Judgment of Conviction was entered on May 5, 1999.

13 Defendant filed a Notice of Appeal on April 30, 1999. The Nevada Supreme Court  
14 affirmed Defendant's conviction and sentence on June 11, 2001. Sutton v. State, Docket No.  
15 34165 (Order of Affirmance, June 11, 2001). Remittitur issued on July 9, 2001.

16 Defendant filed his first pro per Post-Conviction Petition for Writ of Habeas Corpus on  
17 March 25, 2002. The State filed its Response on May 16, 2002. Defendant was subsequently  
18 appointed counsel, and filed a supplement to his First petition on July 26, 2002. The State filed  
19 a Response on September 13, 2002. This Court conducted a hearing on Defendant's first  
20 Petition on October 24, 2002, and subsequently denied Defendant's First Petition, finding that  
21 Defendant's plea was voluntary and that he received effective assistance of counsel. The  
22 Findings of Fact, Conclusions of Law, and Order was filed on November 12, 2002.

23 Defendant filed a Notice of Appeal on November 5, 2002. The Nevada Supreme Court  
24 affirmed the denial of Defendant's First Petition on July 8, 2004. Sutton v. State, Docket No.  
25 40477 (Order of Affirmance, July 8, 2004). Remittitur issued on August 3, 2004.

26 On September 16, 2004, Defendant filed a second pro per Post-Conviction Petition for  
27 Writ of Habeas Corpus that raised claims that his post-conviction counsel was ineffective. The  
28 State filed its Motion to Dismiss Defendant's Second Petition for Writ of Habeas Corpus on

1 September 24, 2004. This Court dismissed Defendant's Second Petition and took the matter  
2 off calendar on November 18, 2004.

3 Defendant filed his third pro per Post-Conviction Petition for Writ of Habeas Corpus  
4 and Motion for Appointment of Attorney on December 22, 2008. The State filed its Response  
5 and Motion to Dismiss on February 2, 2009. This Court dismissed Defendant's Third Petition  
6 on March 5, 2009. The Findings of Fact, Conclusions of Law, and Order was filed on April 2,  
7 2009.

8 Defendant filed a Notice of Appeal on March 20, 2009. The Nevada Supreme Court  
9 affirmed the dismissal of Defendant's Third Petition on procedural grounds on January 12,  
10 2010. Sutton v. State, Docket No. 53466 (Order of Affirmance, Jan. 12, 2010). Remittitur  
11 issued on April 5, 2010.

12 On March 29, 2013, Defendant filed a Motion for Credit against Sentence and  
13 Amended Judgment of Conviction & Motion for Appointment of Counsel. The State filed its  
14 Opposition to both of Defendant's Motions on April 24, 2013. This Court denied Defendant's  
15 Motions on April 26, 2013, and filed a written Order on May 13, 2013.

16 Defendant filed a Notice of Appeal on May 21, 2013. The Nevada Supreme Court  
17 affirmed the denial of Defendant's Motions. Sutton v. State, Docket No. 63263 (Order of  
18 Affirmance, Dec. 13, 2013). Remittitur issued on January 7, 2014.

19 Defendant filed a fourth pro per Post-Conviction Petition for Writ of Habeas Corpus  
20 and Motion for Appointment of Counsel on May 30, 2013. The State filed its Response and  
21 Motion to Dismiss on August 1, 2013. Defendant filed a Reply on August 20, 2013. This Court  
22 denied Defendant's Fourth Petition on September 20, 2013. The Findings of Fact, Conclusions  
23 of Law and Order was filed on October 18, 2013.

24 Defendant filed a Notice of Appeal on October 15, 2013. Subsequently, on June 11,  
25 2014, the Nevada Supreme Court filed its Order of Affirmance. Sutton v. State, Docket No.  
26 64244 (Order of Affirmance, Jun. 11, 2014). Remittitur issued on July 8, 2014.<sup>1</sup>  
27

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28 <sup>1</sup>Since his conviction, Defendant has also filed several motions to correct illegal sentence, along with several motions to withdraw guilty

1                   On November 24, 2014, Defendant filed his fifth pro per Post-Conviction Petition for  
2 Writ of Habeas Corpus and another Motion for Appointment of Counsel. Defendant also filed  
3 a Supplemental Fifth Petition on January 23, 2015. The State filed its Response and Motion  
4 to Dismiss Defendant's Fifth Petition on February 19, 2015. This Court denied Defendant's  
5 Fifth Petition on March 5, 2015, and entered its Findings of Fact, Conclusion of Law, and  
6 Order on March 30, 2015.

7                   Defendant filed a pro per Notice of Appeal from the denial of his Fifth Petition on  
8 March 16, 2015. On March 31, 2015, Defendant filed a pro per Motion for Reconsideration  
9 and Rehearing regarding the denial of his Fifth Petition, which the State opposed on April 16,  
10 2015. This Court denied Defendant's Motion on April 21, 2015.

11                  On December 18, 2015, the Nevada Supreme Court affirmed the denial of Defendant's  
12 Fifth Petition. On February 1, 2016, the Nevada Supreme Court also denied a rehearing.  
13 Remittitur issued on February 26, 2016.

14                  On January 5, 2016, Defendant filed his sixth pro per Post-Conviction Petition for Writ  
15 of Habeas Corpus. The State filed its Response and Motion to Dismiss on February 29, 2016.  
16 On March 8, 2016, this Court denied Defendant's Sixth Petition and granted the State's Motion  
17 to Dismiss. A Findings of Fact, Conclusions of Law, and Order was filed on April 6, 2016.

18                  On May 18, 2016, Defendant filed his seventh pro per Post-Conviction Petition for Writ  
19 of Habeas Corpus, and yet another Motion for Appointment of Counsel. On July 26, 2016 this  
20 Court denied Defendant's Seventh Petition. A Findings of Fact, Conclusions of Law, and  
21 Order was filed on August 18, 2016.

22                  On July 12, 2017, the Nevada Supreme Court affirmed the Judgment of the District Court  
23 and Remittitur issued on September 19, 2017.

24                  Defendant filed his eighth pro per Petition for Writ of Habeas Corpus on May 3, 2017. The  
25 State filed its Response on June 19, 2017. Defendant's Eighth Petition was denied by the  
26 District Court and the Findings of Fact, Conclusions of Law, and Order were entered on  
27

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28                  plea. These motions were all denied by the District Court, and subsequently affirmed by the Nevada Supreme Court.

1 August 11, 2017. Defendant filed a Notice of Appeal from the denial of the Eighth Petition  
2 on July 28, 2017. On September 25, 2017, the Nevada Supreme Court affirmed the denial of  
3 Defendant's Eighth petition.

4 On March 16, 2018, Defendant filed the instant Post-Conviction Petition for Writ of  
5 Habeas Corpus and his Ninth Motion to Appoint Counsel. The State filed its Response on  
6 April 26, 2018. After a hearing on the matter, the Court denied Defendant's Petition and  
7 Motion to Appoint Counsel, finding that it was untimely and his motions were excessive.

## ANALYSIS

**I. DEFENDANT'S NINTH PETITION IS PROCEDURALLY BARRED.**

## A The Ninth Petition is Time-Barred

Under NRS 34.726(1) "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 appellate court of competent jurisdiction. . . issues its remittitur." absent a showing of good cause for delay.

16        The Supreme Court of Nevada has held that NRS 34.726 should be construed by its  
17 plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). The one-  
18 year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction  
19 is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084,  
20 1087, 967 P.2d 1132, 1133-34 (1998).

Moreover, the one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

26       Further, the Nevada Supreme Court has held that the district court has a duty to consider  
27       whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth  
28       Judicial Dist. Court (Riker)

1 found that “[a]pplication of the statutory procedural default rules to post-conviction habeas  
2 petitions is mandatory,” noting:

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

6 Id. Additionally, the Court noted that procedural bars “cannot be ignored [by the district court]  
7 when properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court  
8 has granted no discretion to the district courts regarding whether to apply the statutory  
9 procedural bars; the rules must be applied.

10 In this case, Defendant filed a Notice of Appeal on April 30, 1999. The Nevada  
11 Supreme Court affirmed Defendant’s Judgment of Conviction and Remittitur issued July 9,  
12 2001. Thus, Defendant had until July 9, 2002, to file a timely petition. However, the instant  
13 Ninth Petition was not filed until March 16, 2018 – 17 years after Remittitur issued.  
14 Accordingly, this Ninth Petition is untimely under NRS 34.726(1) and therefore, is denied.

15 **B. The Ninth Petition is Successive**

16 Defendant’s Ninth Petition is also procedurally barred because it is successive. Under  
17 NRS 34.810(2) “[a] second or successive petition must be dismissed if the judge or justice  
18 determines that it fails to allege new or different grounds for relief and that the prior  
19 determination was on the merits or, if new and different grounds are alleged, the judge or  
20 justice finds that the failure of the petitioner to assert those grounds in a prior petition  
21 constituted an abuse of the writ.” (emphasis added). Second or successive petitions will only  
22 be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3);  
23 Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). The Nevada Supreme Court  
24 has stated: “Without such limitations on the availability of post-conviction remedies, prisoners  
25 could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition,  
26 meritless, successive and untimely petitions clog the court system and undermine the finality  
27 of convictions.” Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court  
28 recognizes that “[u]nlike initial petitions which certainly require a careful review of the record,

1 successive petitions may be dismissed based solely on the face of the petition." Ford v.  
2 Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or  
3 allegation was previously available with reasonable diligence, it is an abuse of the writ to wait  
4 to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of  
5 NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074. The instant  
6 Petition is Defendant's Ninth Petition and consists of arguments that were raised in the prior  
7 Petitions and denied, as well as arguments that should have been raised in the prior Petitions.  
8 Therefore, the Ninth Petition is denied.

9 **C. The State Pleads Laches**

10 Because more than 5 years have elapsed between the Judgment of Conviction and the  
11 filing of the instant Ninth Petition, the State affirmately pleaded laches pursuant to NRS  
12 34.800(2) and sought to avail itself of that statute's rebuttable presumption of prejudice.

13 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
14 exceeding five years [elapses] between the filing of a judgment of conviction, an order  
15 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of  
16 conviction and the filing of a petition challenging the validity of a judgment of conviction..."  
17 The Nevada Supreme Court observed in Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268  
18 (1984), that "petitions [] filed many years after conviction are an unreasonable burden on the  
19 criminal justice system. The necessity for a workable system dictates that there must exist a  
20 time when a criminal conviction is final." To invoke the presumption, the statute requires the  
21 State to plead laches. NRS 34.800(2).

22 Defendant filed this Ninth Petition approximately 19 years after the JOC was filed.  
23 Defendant's delay exceeds the statute's presumptively prejudicial time period. The State  
24 would be unreasonably burdened to identify witnesses and evidence in order to refute  
25 Defendant's allegations. Defendant has failed to rebut the presumption of prejudice. Thus, this  
26 Ninth Petition is barred by laches and is therefore, denied.

27 **II. Defendant has Failed to Demonstrate Good Cause**

28 A showing of good cause and prejudice may overcome procedural bars. To show good

1 cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) “[t]hat  
2 the delay is not the fault of the petitioner” and (2) that the petitioner will be “unduly  
3 prejudice[d]” if the petition is dismissed as untimely. See NRS 34.726(1).

4 “To establish good cause, appellants must show that an impediment external to the  
5 defense prevented their compliance with the applicable procedural rule. A qualifying  
6 impediment might be shown where the factual or legal basis for a claim was not reasonably  
7 available at the time of default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003)  
8 (emphasis added). Moreover, “appellants cannot attempt to manufacture good cause[.]” Id. at  
9 621, 81 P.3d at 526; see also Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07  
10 (2003) (stating that a claim reasonably available to the petitioner during the statutory time  
11 period did not constitute good cause to excuse a delay in filing).

12 In addition to establish good cause, a petitioner must also show actual prejudice  
13 resulting from the errors of which he complains. In other words, in order to establish prejudice,  
14 the defendant must show “not merely that the errors of [the proceedings] created possibility  
15 of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the  
16 state proceedings with error of constitutional dimensions.” Hogan v. Warden, 109 Nev. 952,  
17 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct.  
18 1584, 1596 (1982)). To find good cause there must be a “substantial reason; one that affords  
19 a legal excuse.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting  
20 Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)).

21 Moreover, claims asserted in a petition for post-conviction relief must be supported  
22 with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove,  
23 100 Nev. at 502, 686 P.2d at 225. “Bare” and “naked” allegations are not sufficient, nor are  
24 those belied and repelled by the record. Id.

25 Further, the United States Supreme Court has held that in order for a defendant to obtain  
26 a reversal of his conviction based on a claim of actual innocence, he must prove that “it is  
27 more likely than not that no reasonable juror would have convicted him in light of the new  
28 evidence’ presented in habeas proceedings.” Calderon v. Thompson, 523 U.S. 538, 560, 118

1 S. Ct. 1489, 1503 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867  
2 (1995)).

3 In an attempt to overcome these multiple mandatory bars, Defendants claims actual  
4 innocence because there was allegedly no evidence that he killed the victim with malice  
5 aforethought and by challenging his plea canvas based on Byford v. State, 116 Nev. 215, 235,  
6 994 P.2d 700, 713 (2000). This claim is barred by law of the case doctrine.

7 In this case, Defendant raised a claim of actual innocence in one of his previous appeals.  
8 Moreover, in affirming the denial of Defendant's First Petition, the Nevada Supreme Court  
9 held that his claim of actual innocence was essentially a claim as to the validity of his plea,  
10 which the Court held had been voluntarily and knowingly entered. Sutton v. State, Docket No.  
11 71025 (Order of Affirmance, July 12, 2017). Further, the Court held that Byford did not  
12 establish good cause to overcome a procedurally barred petition and, even if it did, Defendant  
13 had failed to raise the issue within one year after Byford had been decided. Id. Therefore,  
14 because Defendant raises the same issue again in the instant Petition, his claim is barred by  
15 the law of the case doctrine. In addition, this challenge to the plea canvass is not a claim of  
16 actual innocence. Defendant never disputes that he killed the victim. Rather, he again raises a  
17 challenge to his plea canvass and evidence of intent in light of Byford which, as discussed  
18 supra, has already been rejected by the Nevada Supreme Court. Accordingly, Defendant has  
19 failed to establish good cause to overcome the multiple mandatory bars to his Ninth Petition  
20 and therefore, it is denied.

### 21 **III. DEFENDANT IS NOT ENTITLED TO COUNSEL**

22 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-  
23 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566  
24 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada  
25 Supreme Court similarly observed that “[t]he Nevada Constitution...does not guarantee a right  
26 to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to  
27 counsel provision as being coextensive with the Sixth Amendment to the United States  
28 Constitution.” McKague specifically held that with the exception of NRS 34.820(1)(a)

1 (entitling appointed counsel when petitioner is under a sentence of death), one does not have  
2 "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at  
3 164, 912 P.2d at 258.

4 However, the Nevada Legislature has given courts the discretion to appoint post-  
5 conviction counsel so long as "the court is satisfied that the allegation of indigency is true and  
6 the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

7 A petition may allege that the Defendant is unable to pay the costs  
8 of the proceedings or employ counsel. If the court is satisfied that  
9 the allegation of indigency is true and the petition is *not dismissed*  
10 *summarily*, the court may appoint counsel at the time the court  
orders the filing of an answer and a return. In making its  
determination, the court may consider whether:

11 (a) The issues are difficult;  
12 (b) The Defendant is unable to comprehend the proceedings; or  
13 (c) Counsel is necessary to proceed with discovery.

14 (emphasis added). Under NRS 34.750, the court has discretion in determining whether to  
15 appoint counsel.

16 Here, there are no issues present before the Court that are difficult as Defendant's  
17 conviction has been affirmed by the Nevada Supreme Court seven times. Additionally,  
18 Defendant has filed numerous pro-per post-conviction petitions, which indicates that he is  
19 capable of comprehending the proceedings. Further, considering that there are no pending  
20 motions, and no new issues presented, there is no need for discovery and thus no need for the  
21 assistance of counsel. Lastly, in the event that counsel were to be appointed, any subsequent  
22 petition for writ of habeas corpus would be procedurally barred under NRS 34.726(1) and  
23 NRS 34.810(2). For all these reasons, Defendant's request for counsel is denied.

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## ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief and Request for Counsel shall be, and are, hereby denied.

DATED this 12<sup>th</sup> day of June, 2018.

Mesany Johnson  
DISTRICT JUDGE

~~DISTRICT JUDGE~~

Y.A.M. C 139518.

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

BY

KRISTA D. BARRIE  
Chief Deputy District Attorney  
Nevada Bar #10310

**CERTIFICATE OF MAILING**

I hereby certify that service of the above and foregoing was made this 7th day of June, 2018, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

KEVIN SUTTON #61281  
LOVELOCK CORRECTIONAL CENTER  
1200 Prison Road  
Lovelock, NV 89419

BY /s/Deana Daniels  
Secretary for the District Attorney's Office

# Appendix E

# Appendix E

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN DEVON SUTTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75988

**FILED**

JUL 03 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Younger  
DEPUTY CLERK

**ORDER GRANTING MOTION**

Appellant has moved to stay issuance of the remittitur pending the filing of a petition for a writ of certiorari with the United States Supreme Court. Cause appearing, the motion is granted. See NRAP 41(b)(3). This court hereby stays issuance of the remittitur until October 30, 2019. If the clerk of this court receives written notice by October 30, 2019, from the clerk of the United States Supreme Court that appellant has filed a petition for a writ of certiorari, the stay shall continue in effect until final disposition of the certiorari proceedings. If such notice is not received by October 30, 2019, the remittitur shall issue forthwith.

It is so ORDERED.

 C.J.

cc: Hon. Susan Johnson, District Judge  
Kevin Devon Sutton  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk