

IN THE SUPREME COURT OF THE STATE OF NEVADA

PABLO RAMON GUERRERO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 78247

FILED

SEP 25 2020

ELIZABETH A. BYRNE  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

**ORDER DENYING PETITION FOR REVIEW**

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

It is so ORDERED.

*Pickering*, C.J.  
Pickering

*Hardesty*, J.  
Hardesty

*Parraguirre*, J.  
Parraguirre

*Stiglich*, J.  
Stiglich

<sup>1</sup>The Honorable Mark Gibbons, Abbi Silver, and Elissa Cadish  
Justice, did not participate in the decision of this matter.

E.13

cc: Chief Judge, The Eighth Judicial District Court  
Hon. James M. Bixler, Senior Judge  
Terrence M. Jackson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

E-14

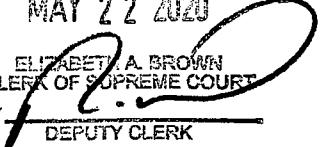
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PABLO RAMON GUERRERO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 78247-COA

**FILED**

MAY 22 2020

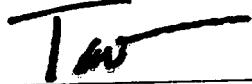
ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

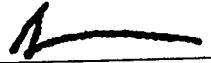
*ORDER DENYING REHEARING*

Rehearing denied. NRAP 40(c).

It is so ORDERED.

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

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

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

cc: Chief Judge, Eighth Judicial District Court  
Hon. James M. Bixler, Senior Judge  
Pablo Ramon Guerrero  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

B6

20-19603

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PABLO RAMON GUERRERO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 78247-COA

**FILED**

MAR 12 2020

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

*ORDER OF AFFIRMANCE*

Pablo Ramon Guerrero appeals from an order of the district court denying his postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Senior Judge.

Guerrero argues the district court erred by denying his September 7, 2018, petition and later-filed supplement as procedurally barred. Guerrero filed his petition more than 13 years after issuance of the remittitur on direct appeal on July 12, 2005. *Guerrero v. State*, Docket No. 43115 (Order Affirming in Part, Reversing in Part, and Remanding, June 15, 2005). Thus, Guerrero's petition was untimely filed. *See* NRS 34.726(1). Moreover, Guerrero's petition was successive because he had previously filed two postconviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.<sup>1</sup> *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Guerrero's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS

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<sup>1</sup>*Guerrero v. State*, 69678 (Order of Affirmance, June 15, 2017); *Guerrero v. State*, Docket No. 59697 (Order of Affirmance, January 16, 2013).

A1

10-09785

34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Guerrero was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2). To warrant an evidentiary hearing, petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *See Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1155 (2015).

First, Guerrero claimed he had good cause to assert that his trial counsel violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by issuing peremptory strikes against male jurors. Guerrero acknowledged he raised this issue during the litigation of his first petition and the claim was denied by the district court, but he contended he should be permitted to again raise this issue in light of the Nevada Supreme Court's decision in *Bradford v. State*, Docket No. 62108 (Order of Reversal and Remand, October 24, 2017). However, *Bradford* discussed and applied an earlier opinion, *Brass v. State*, 128 Nev. 748, 291 P.3d 145 (2012). Guerrero provided no explanation for his delay from the issuance of the *Brass* decision. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Moreover, Guerrero did not overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2). Therefore, Guerrero failed to demonstrate the district court erred by denying this good-cause claim without conducting an evidentiary hearing.

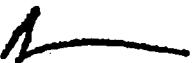
Second, Guerrero claimed he would suffer from a fundamental miscarriage of justice if his claims were not considered on their merits because he is actually innocent. Guerrero based his actual-innocence claim upon assertions that he was not criminally liable for the actions of his codefendant and the trial court improperly instructed the jury. A petitioner

may overcome the procedural bars and “secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice.” *Berry*, 131 Nev. at 966, 363 P.3d at 1154. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Guerrero’s claims involve legal, not factual innocence. In addition, the record demonstrates that Guerrero’s actual-innocence claim was not based upon new evidence and, therefore, his claim failed. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) (“To be credible, [an actual-innocence claim] requires petitioner to support his allegations of constitutional error with new reliable evidence.”). Accordingly, we conclude the district court did not err by denying Guerrero’s petition without conducting an evidentiary hearing, and we

ORDER the judgment of the district court AFFIRMED.

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

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

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

A3

cc: Chief Judge, Eighth Judicial District Court  
Hon. James M. Bixler, Senior Judge  
Pablo Ramon Guerrero  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

A.L

# ORIGINAL

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CLERK OF THE COURT**

1 **FCCO**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
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8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

## 9 THE STATE OF NEVADA,

Plaintiff,

-VS-

12 | PABLO RAMON GUERRERO,  
#1729482

Defendant.

CASE NO: 02C180840-2

DEPT NO: VI

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

DATE OF HEARING: JANUARY 7, 2019  
TIME OF HEARING: 8:30 AM

19        THIS CAUSE having presented before the Honorable JOSEPH T. BONAVENTURE,  
20      District Judge, on the 7th day of January, 2019; Petitioner not being present, proceeding IN  
21      PROPER PERSON; Respondent being represented by STEVEN B. WOLFSON, Clark County  
22      District Attorney, by and through EKATERINA DERJAVINA, Deputy District Attorney; and  
23      having considered the matter, including briefs, transcripts, arguments of counsel, and  
24      documents on file herein, the Court makes the following Findings of Fact and Conclusions of  
25      Law:

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H-23

## **FINDINGS OF FACT**

## **CONCLUSIONS OF LAW**

On January 14, 2002, the State of Nevada (hereinafter "State") filed an Information charging Pablo Guerrero with the following: Count 1 – Burglary (Felony – NRS 205.060); Count 2 – Child Abuse and Neglect (Gross Misdemeanor – NRS 200.508); Count 3 – Preventing or Dissuading Victim from Reporting Crime (Felony – NRS 199.305); Count 4 – Sexual Assault (Felony – NRS 200.364, 200.366); Count 5 – Conspiracy to Commit Burglary (Felony – NRS 199.480, 205.060); Counts 6 and 7 – Burglary while in Possession of a Firearm (Felony – NRS 205.060); Count 8 – Conspiracy to Commit Kidnapping (Felony – NRS 199.480, 200.310, 200.320); Count 9 – First Degree Kidnapping with Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165); Count 10 – First Degree Kidnapping with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS 200.310, 200.320, 193.165, 0.060); Count 11 – Conspiracy to Commit Murder (Open Murder) (Felony – NRS 199.480, 200.010, 193.165); Count 12 – Attempt Murder with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS 193.330, 200.010, 200.030, 193.165, 0.060); Count 13 – Conspiracy to Commit Robbery with Use of a Deadly Weapon (Felony – NRS 199.480, 200.380, 193.165); Count 14 – Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); and Count 15 – Grand Larceny (Felony – NRS 205.220, 205.222).

On October 7, 2003, Guerrero's jury trial commenced. On October 16, 2003, Guerrero's jury returned with a verdict finding him guilty of all counts except for Count 2 – Child Abuse and Neglect.

On March 1, 2004, Guerrero appeared for sentencing. Prior to adjudging Guerrero guilty, this Court dismissed Count 1 – Burglary and Count 6 – Burglary while in Possession of a Firearm as duplicitous. Thereafter, this Court sentenced Guerrero as follows: Count 3 – a minimum of 12 months and a maximum of 34 months in the Nevada Department of Corrections (hereinafter “NDC”); Count 4 – a minimum of one 120 months to a maximum of life in the NDC; Count 5 – 12 months in the Clark County Detention Center; Count 7 – a minimum of 48 months and a maximum of 120 months in the NDC; Count 8 – a minimum of

1 24 months and a maximum of 60 months in the NDC; Count 9 – a minimum of 60 months and  
2 a maximum of life in the NDC, with an equal and consecutive minimum of 60 months and a  
3 maximum of life in the NDC for the deadly weapon enhancement; Count 10 – a minimum of  
4 180 months and a maximum of life in the NDC, with an equal and consecutive minimum of  
5 180 months and a maximum of life in the NDC for the deadly weapon enhancement; Count  
6 11 – a minimum of 48 months and a maximum of 120 months in the NDC; Count 12 – a  
7 minimum of 60 months and a maximum of 180 months in the NDC, with an equal and  
8 consecutive minimum of 60 months and a maximum of 180 months in the NDC for the deadly  
9 weapon enhancement; Count 13 – a minimum of 24 months and a maximum of 60 months in  
10 the NDC, with an equal and consecutive minimum of 24 months and a maximum of 60 months  
11 in the NDC for the deadly weapon enhancement; Count 14 – a minimum of 48 months and a  
12 maximum of 120 months in the NDC with an equal and consecutive minimum of 48 months  
13 and a maximum of 120 months in the NDC for the deadly weapon enhancement; Count 15 –  
14 a minimum of 12 months and a maximum of 36 months in the NDC. This Court ordered the  
15 sentences on all counts to run concurrent to one another and it granted Guerrero 869 days  
16 credit for time served. The Judgment of Conviction was filed on March 31, 2004.

17 On April 5, 2004, Guerrero filed a Notice of Appeal. On June 15, 2005, the Nevada  
18 Supreme Court ordered this Court's judgment affirmed in part and reversed in part. Remittitur  
19 issued on July 12, 2005. On August 15, 2005, pursuant to the Nevada Supreme Court's Order,  
20 this Court vacated Guerrero's deadly weapon enhancement on Count 13 (Conspiracy to  
21 Commit Robbery with Use of a Deadly Weapon) and sentenced Guerrero on Count 13 to a  
22 minimum of 12 months and a maximum of 60 months in the NDC.

23 On June 6, 2006, Guerrero filed a Post-Conviction Petition for Writ of Habeas Corpus.  
24 On October 15, 2010, this Court held an evidentiary hearing on Guerrero's Petition. After  
25 Guerrero's testimony, this Court continued the hearing for further review of evidence, trial  
26 transcript and an affidavit of Guerrero's co-Defendant. On May 26, 2011, this Court heard  
27 arguments on Guerrero's Petition and took the matter under advisement. On October 13, 2011,  
28 this Court entered a order denying Guerrero's Petition. On November 14, 2011, Guerrero filed

1 a Notice of Appeal from this Court's denial of his Petition for Writ of Habeas Corpus. On  
2 February 12, 2013, the Nevada Supreme Court ordered this Court's judgment affirmed.  
3 Remittitur issued on the same day. On November 14, 2011, Guerrero filed a Motion for a  
4 Rehearing Based on Newly Discovered Evidence. On November 21, 2011, the State filed its  
5 Opposition. On November 28, 2011, Guerrero's Motion was denied. On December 14, 2011,  
6 Guerrero filed an Opposition to the State's Opposition for Guerrero's Motion for Rehearing.

7 Guerrero filed his Second Petition for Writ of Habeas Corpus on September 8, 2015.  
8 The State filed its response on October 14, 2015. On November 30, 2015, this Court conducted  
9 a final hearing regarding Guerrero's Petition. It issued its order granting the State's motion to  
10 dismiss on January 26, 2016. The Petitioner filed a Notice to Appeal the next day, January 27,  
11 2016. The Nevada Supreme Court affirmed this order on June 15, 2015, and filed the Clerk's  
12 Certificate on July 19, 2017.

13 Petitioner filed his Third Petition for Writ of Habeas Corpus on September 7, 2017. The  
14 State responded on October 4, 2018.

15 On October 25, 2018, Petitioner filed a document entitled 3<sup>rd</sup> Habeas Corpus  
16 (Amended) Petition, Part (1). The State responded on December 10, 2018. This Court denied  
17 the instant Third Amended Petition on January 7, 2019.

18 **STATEMENT OF THE FACTS**

19 Petitioner was married to Brenda Guerrero. Petitioner and Brenda have two children  
20 (Pablo Jr., "Pablito", and Anthony). As of May 2001, Brenda and the children had moved out  
21 of the marital residence and were living with Brenda's parents, the Gallardo's, at 1518 Juniper  
22 Twig Ave., Las Vegas, Nevada.

23 On November 6, 2001, Brenda was asleep at her parent's house when she received a  
24 call from Petitioner at 1:30 a.m. Petitioner asked Brenda if she was positive that she had not  
25 been speaking with any male friends on her cell phone. Brenda said no and hung up and went  
26 back to sleep.

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H.26

1           Later that day at 9:00 a.m. Brenda heard the doorbell ring. She did not answer the door  
2 because she thought it was Petitioner. Shortly thereafter, Petitioner called Brenda and told her  
3 that he was at the Target store nearby and that he was going to return to the Gallardo residence.  
4 Petitioner returned a short while later and Brenda reluctantly let him in

5           Petitioner requested sex from Brenda and she refused. He became upset and confronted  
6 Brenda about her cell phone bill and wanted to know who she was calling. Brenda told  
7 Petitioner to leave, but he refused, and instead punched Brenda in the face and she fell to the  
8 floor. Brenda felt pain in her face and temple area. Brenda's son Pablito observed Petitioner  
9 hit her in the face knocking her to the ground. Brenda attempted to use the phone to call the  
10 police but Petitioner took it from her and ripped the battery out.

11          Brenda was scared and crying, and told Petitioner that her parents would be home soon.  
12 Petitioner stated "let them come home and I'll shoot them too." Petitioner said that he had a  
13 surprise for Brenda at 10:00 a.m. Petitioner's co-conspirator Eriberto Leon (Eddy) arrived at  
14 the Gallardo residence at 10:00 a.m. and Petitioner let him in. Eddy was wearing black gloves  
15 and Brenda asked him if he was planning on helping Petitioner. Eddy did not respond to  
16 Brenda but complied with Petitioner's instructions. Petitioner told Eddy to go upstairs and  
17 pack Brenda's clothes which he did.

18          Petitioner then coerced Brenda to go upstairs and have sex with him promising that he  
19 would leave after. Brenda and Petitioner went upstairs to Brenda's room where they had sex.  
20 Brenda was scared and crying and could see in the mirror in her room that her face was swollen  
21 from Petitioner hitting her. After having sex, Brenda asked Petitioner to leave as he had  
22 promised, but he refused.

23          Petitioner took Brenda downstairs, where she broke away and ran to the front door,  
24 stuck her head out the door and screamed for help. Petitioner grabbed Brenda and threw her  
25 to the floor calling her a stupid bitch and that he was going to kill Pablito, her son, for what  
26 she had done.

27          //

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H.27

1 Eddy took Pablito out and put him in Brenda's parent's van which he had moved into  
2 the garage. Pablito told Eddy that he had seen his dad hit his mom in the face. Petitioner had  
3 Brenda on the floor with his hand over her mouth. Brenda was able to get away and ran out  
4 to the garage and got her son out of the van.

5 Petitioner put Brenda in the van. He instructed Eddy to go get his gun he had left in the  
6 bushes in front of the house and the "stuff from the car." Eddy returned with the gun, rope,  
7 duct tape and a flashlight. Petitioner asked Eddy if he had his gun and he nodded affirmatively  
8 and patted his pocket. Petitioner told Eddy to go get something to cut the rope and Eddy  
9 returned with a kitchen knife.

10 Petitioner tied up Brenda's ankles, legs, and wrists with rope and put tape over her  
11 mouth. Brenda was crying and very scared. Eddy stood by and did not assist Brenda or ask  
12 Petitioner to stop.

13 Petitioner left Eddy at the Gallardo residence with the two children and, with Brenda,  
14 bound and gagged, went to Silverado High School to pick up Sonia Gallardo, Brenda's  
15 younger sister. Sonia was surprised to see Petitioner in the family van but it was not until after  
16 she was driving away with Petitioner that she noticed a gun in his lap, and Brenda tied up in  
17 the back of the van. Sonia began crying and pleading with Petitioner not to hurt Brenda or do  
18 anything that he would regret.

19 Petitioner returned to the Gallardo residence, where Eddy was waiting, and parked the  
20 van in the garage. Petitioner removed the tape from Brenda's mouth and demanded Brenda's  
21 cellular phone from inside the house. Petitioner instructed Eddy to take Sonia in and get the  
22 cellular phone, which he did. Upon returning to the van with the phone, Petitioner told Eddy  
23 to go get Brenda's clothes that he had previously packed and to disconnect the phones so that  
24 Sonia could not call the police. Eddy went and got the clothes and loaded them in the van.

25 Sonia and Brenda observed Petitioner and Eddy standing by the van inside the garage  
26 whispering to each other and pointing to the house. Brenda overheard Petitioner tell Eddy "I'll  
27 meet you at state-line in one hour." Brenda yelled to Sonia to go inside and lock the door.  
28 Sonia heard the van leave and the garage door close. She then observed Eddy enter the house

H-28

1 using a key. Eddy forced Sonia upstairs into her parent's room. Pablito was following them,  
2 so Eddy forced Sonia into her parent's closet and closed the door. Sonia was pleading for her  
3 life. Eddy laughed at her and told her not to "make it any harder." Eddy pushed her on the  
4 floor in the closet, put a baby blanket over Sonia's face, and shot her between the eyes leaving  
5 her for dead.

6 Miraculously Sonia did not die from the gun shot. After waiting in the closet for  
7 approximately 15 minutes to ensure Eddy had left, she tried to call 911 but the phone lines  
8 were cut. She eventually crawled to a neighbor's house who called the police.

9 Meanwhile, Petitioner drove to state-line and waited for Eddy. Once at state-line  
10 Petitioner again began yelling at Brenda about her cellular phone bill. Petitioner threatened  
11 Brenda that if she tried to get help Sonia and Pablito would be hurt, showing Brenda that he  
12 had given Eddy a house key off the van's key ring. Petitioner punched and slapped Brenda as  
13 he became more agitated that Eddy had not arrived at state-line. He put the gun he had been  
14 carrying to Brenda's head twice and threatened to shoot her once the police caught up with  
15 him and then kill himself. Brenda was terrified the entire time and was throwing up in the  
16 back of the van in a t-shirt. Petitioner waited a couple of hours for Eddy, who never arrived.

17 Petitioner eventually left state-line and a police pursuit ensued which resulted in  
18 Petitioner's capture near Victorville, California.

19 Sonia spent five days in the hospital and underwent surgery as a result of the gunshot  
20 wound to the head. She now suffers from head pain, migraines, blurred vision and nightmares,  
21 and has a scar on the bridge of her nose.

22 Police seized the van and investigated its contents, discovering gold rings and bracelets  
23 inside a glove in the pocket of a flannel shirt which had been stolen from the bedroom dresser  
24 of Brenda's Mom, Mrs. Maria Gallardo.

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## ARGUMENT

**THE INSTANT THIRD PETITION IS PROCEDURALLY BARRED.**

a. The instant Third Amended Petition is time barred.

Petitioner's Petition for Writ of Habeas Corpus is time barred with no good cause shown for delay. Pursuant to NRS 34.726(1):

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 of the 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. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

- (a) That the delay is not the fault of the petitioner; and
- (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

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

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.

Furthermore, the Nevada Supreme Court has held that the district court has a duty to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that “[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory,” noting:

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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.

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

Here, Petitioner concedes that this Petition is time barred. Third Amended Petition at 5. The Nevada Supreme Court issued remittitur on Guerrero's direct appeal on July 12, 2005. Thus, Guererro had one year from that date to raise a timely Post-Conviction Petition for Writ of Habeas Corpus. However, Guerrero did not bring the instant Third Amended Petition until October 25, 2018, well beyond NRS 34.726's statutory deadline. Accordingly, the instant Third Amended Petition is time barred.

b. The instant Third Amended Petition is successive and abuses the writ.

Additionally, Petitioner's Petition is procedurally barred because it is successive. 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 fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that 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), overruled on other grounds by Rippo v. State, \_\_\_ Nev. \_\_\_, 368 P.3d 729 (2016).

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H.31

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

12           Here, Petitioner concedes this petition is successive, as he has filed two previous  
13 Petitions for Writ of Habeas Corpus. Third Amended Petition at 6. For these reasons, this  
14 Court finds that this Petition is successive and its claims, which could have been raised in an  
15 earlier petition, are an abuse of the writ. NRS 34.810(2).

16           c. **The State affirmatively pleaded laches.**

17           NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
18 exceeding five years between the filing of a judgment of conviction, an order imposing a  
19 sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the  
20 filing of a petition challenging the validity of a judgment of conviction." The statute also  
21 requires that the State plead laches in its motion to dismiss the petition. NRS 34.800.

22           The State pleaded laches here. Remittitur issued on July 12, 2005. Thus, Petitioner had  
23 until July 13, 2010 to file the instant petition before the doctrine of laches added yet another  
24 procedural bar to his claim. Because the five-year period granted by the legislature ended more  
25 than eight (8) years ago, there is now a rebuttable presumption that the State will be prejudiced  
26 by the instant Third Amended Petition. Petitioner has not shown good cause or prejudice to  
27 rebut this presumption. The doctrine of laches bars his claim.

28           //

H.32

d. Several of petitioner's claims are barred by NRS 34.810(1).

NRS 34.810(1) reads:

The court shall dismiss a petition if the court determines that:

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

In applying this statute, the Nevada Supreme Court has held that “challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings...[A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings.” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). “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).

II. Petitioner has not shown good cause to overcome his many procedural bars.

Because of these procedural bars, Petitioner must now show good cause for his Petition to survive review. Absent a showing of good cause for this delay and undue prejudice, Petitioner's claim must be dismissed because of its tardiness, its successiveness, and its presumption of prejudice under the doctrine of laches.

A showing of good cause and prejudice may overcome procedural bars. “To establish good cause, appellants *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) (emphasis added). The Court continued, “appellants cannot attempt to manufacture good cause[.]” *Id.* at 621, 81 P.3d at 526.

1 In order to establish prejudice, the defendant must show “not merely that the errors of [the  
2 proceedings] created possibility of prejudice, but that they worked to his actual and substantial  
3 disadvantage, in affecting the state proceedings with error of constitutional dimensions.”  
4 Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v.  
5 Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596 (1982)). To find good cause there must be a  
6 “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119 Nev. 248, 252,  
7 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230  
8 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner.  
9 NRS 34.726(1)(a). Similarly, “[b]are” and “naked” allegations are not sufficient to warrant  
10 post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100  
11 Nev. 498, 502, 686 P.2d 222, 225 (1984). “A claim is ‘belied’ when it is contradicted or  
12 proven to be false by the record as it existed at the time the claim was made.” Mann v. State,  
13 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

14 **A. Petitioner has not shown good cause to overcome the procedural bars to his claim  
15 that the district court abused its discretion by not conducting a Batson analysis.**

16 To overcome the many procedural bars to his Third Amended Petition, Petitioner claims  
17 that he is raising a new claim based on a previously unavailable legal basis. He claims that his  
18 trial counsel used peremptory challenges to eliminate men from the jury pool, the State  
19 challenged this conduct under J.E.B. v. Alabama, 511 U.S. 127 (1994), and that the Court did  
20 not conduct a hearing as required by Libby v. State, 115 Nev. 45, 54, 975 P.2d 833, 839 (1999).  
21 Third Amended Petition at 28. He claims that he did not have any redress for this error until  
22 this Court’s holding in Order of Affirmance, Bradford v. State, No. 62108 (2017)  
23 (unpublished). This is incorrect. The Bradford court itself made clear that it was merely  
24 applying Brass v. State, 128 Nev. 748, 754, 291 P.3d 145, 149 (2012), not making new law:

25 We have held that the dismissal of veniremembers before a Batson  
26 hearing "ha[s] the same effect as a racially discriminatory peremptory  
27 challenge" and "constitutes structural error that [is] intrinsically  
28 harmful to the framework of the trial." Brass v. State, 128 Nev. 748,  
754, 291 P.3d 145, 149 (2012). In so holding, we noted our concerns  
that premature dismissal leaves the successful opponent of a  
peremptory challenge with limited recourse and may possibly

1 "present the appearance of improper judicial bias." *Id.* at 754 & n.4,  
2 291 P.3d at 149 & n.4. And while the State urges us to reconsider and  
3 apply harmless-error review, we conclude there are no compelling  
4 reasons to overturn our precedent. *See Armenta-Carpio v. State*, 129  
5 Nev. 531, 535, 306 P.3d 395, 398 (2013) ("Under the doctrine of *stare*  
6 *decisis*, we will not overturn precedent absent compelling reasons for  
7 doing so." (quotation marks and alterations omitted)).

8 Here, the State does not dispute that defense counsel attempted to  
9 make two *Batson* objections during the peremptory process and that  
10 counsel were not permitted to be heard until after veniremembers,  
11 including those who were the subject of the *Batson* objections, were  
12 dismissed. Per our holding in *Brass*, this premature dismissal of the  
13 challenged veniremembers before a *Batson* hearing constitutes  
14 structural error.

15 Order of Affirmance, Bradford v. State, No. 62108 (2017) at 1-2 (emphasis added). Petitioner  
16 himself recognizes that Bradford merely "reaffirmed" prior law. Third Amended Petition at  
17 32. Because Bradford was the straightforward application of Brass, which has been available  
18 to Appellant since 2012, he has not shown good cause to overcome the procedural bars to the  
19 claims in the instant Third Amended Petition. As this is the only attempt at showing good  
20 cause that Petitioner has made, the instant Third Amended Petition is denied in its entirety.

21 **B. Petitioner's claim that the court abused its discretion when it decided on the  
22 jury instructions is procedurally barred.**

23 Petitioner next alleges that this Court abused its discretion by including jury instructions  
24 that, he claims, resulted in the jury not considering the elements of his Attempted Murder  
25 charge. Petition at 14. The necessary law and facts are the same as when Petitioner was  
26 convicted, and he has not shown good cause or prejudice for failing to bring this claim on  
27 direct appeal. NRS 34.810(1). Furthermore, to the extent that Petitioner is claiming that his  
28 trial counsel erred in not seeking the jury instructions he claims were appropriate, this claim  
// has been available since 2005 since remittitur issued, and Petitioner has not attempted to show  
// why he did not raise the claim of ineffective assistance—which is itself timebarred and cannot  
// constitute good cause—in an earlier petition. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d  
// 503, 506 (2003). Accordingly, the instant Third Amended Petition is denied as to this claim.

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1                   **C. Petitioner's claim that the district court erred by allowing his co-defendant invoke**  
2                   **his right against self-incrimination under the Fifth Amendment in a 2011**  
3                   **evidentiary hearing where the court considered the merits of his first Petition for**  
4                   **Writ of Habeas Corpus is procedurally barred.**

5                   Next, Petitioner claims that the district court erred by allowing his co-defendant invoke  
6                   his right against self-incrimination under the Fifth Amendment in a 2011 evidentiary hearing  
7                   where the court considered the merits of his first Petition for Writ of Habeas Corpus. Petition  
8                   at 21-23. Petitioner has not attempted to show good cause for bringing this claim more than  
9                   seven years after it could have been raised. His claim rests on the holding of Mitchell v. United  
10                  States, where the Supreme Court made clear that there is no Fifth Amendment right against  
11                  self-incrimination where a "sentence has been fixed and the judgment of conviction has  
12                  become final." 526 U.S. 314, 326 (1999); Third Amended Petition at 22. This decision has  
13                  been the law since before he even committed the crime, and it was the law in 2011 when his  
14                  co-defendant invoked the right. Petitioner has shown no good cause for failing to bring this  
15                  claim until more than seven years later. Even if, as Petitioner claims, "the district court, the  
16                  State, Leon's counsel, and defense counsel" are all external to him, he has not shown any  
17                  reason external to him in the subsequent seven years. Third Amended Petition at 22. Moreover,  
18                  Petitioner's own counsel, as his agent, is certainly not external to him. See Maples v. Thomas,  
19                  565 U.S. 266, 280-81 (2012). To the extent that Petitioner is claiming that his post-conviction  
20                  counsel was ineffective, that claim cannot be used to show good cause as it is itself  
21                  procedurally barred and otherwise meritless as there is no right to counsel in post-conviction  
22                  proceedings. Hathaway, 119 Nev. at 252, 71 P.3d at 506; Coleman v. Thompson, 501 U.S.  
23                  722, 752, 111 S.Ct. 2546, 2566 (1991). According, the instant Third Amended Petition is  
denied as to this claim.

24                   **D. Petitioner's claim that his counsel was ineffective for failing to argue that**  
25                   **Petitioner was intoxicated at the time of the crimes and therefore could not have**  
26                   **formed the requisite specific intent is procedurally barred.**

27                   Petitioner then claims that his counsel was ineffective for failing to argue that because  
28                   there was evidence that Petitioner had smoked marijuana and drank the night before the crimes,  
he couldn't have had the specific intent necessary to commit Attempted Murder. Petition at

1 24-25. Petitioner concedes that the issue was available, but not raised, on direct appeal. Third  
2 Amended Petition at 24. Moreover, as Petitioner testified at trial that the night before he had  
3 been out drinking and smoking marijuana, the underlying factual claim of his intoxication is  
4 not based on new information. Id. He has not attempted to allege good cause or prejudice to  
5 show why this Court should overlook the procedural bars to this claim. Furthermore, as  
6 Petitioner has provided no evidence to suggest that he was so intoxicated to deprive him of the  
7 ability to form specific intent, this claim is bare and naked under Hargrove, 100 Nev. at 502,  
8 686 P.2d at 225. As this claim of ineffectiveness is itself procedurally barred, he cannot show  
9 good cause for failing to bring this claim in an earlier petition. Hathaway, 119 Nev. at 252, 71  
10 P.3d at 506 (“[T]o constitute adequate cause, the ineffective assistance of counsel claim itself  
11 must not be procedurally defaulted.”). Furthermore, to the extent that Petitioner is alleging that  
12 the district court erred in not sua sponte instructing the jury about Petitioner’s intoxication, it  
13 is inappropriate to raise here. NRS 34.810(1). Accordingly, the instant Third Amended Petition  
14 is denied as to this ground.

15 **E. Petitioner’s claim that he is actually innocent of the kidnapping charge is  
16 procedurally barred.**

17 Fourth, he claims that he is actually innocent of the kidnapping charge under Mendoza  
18 v. State, 122 Nev. 267, 130 P.3d 176 (2006) because the movement of the victim did not  
19 substantially increase danger to her. Mendoza was decided within a year of remittitur issuing,  
20 and Petitioner has not attempted to show good cause or prejudice for failing to raise this claim  
21 in the intervening twelve years, as the necessary law and facts have long been available to him  
22 throughout that time.

23 Furthermore, Petitioner cannot show that he was actually innocent because the  
24 Mendoza court was distinguishing murder from other crimes and holding that the requirement  
25 that the State show that movement was more than incidental to other crimes to convict an  
26 accused of kidnapping “does not apply when the underlying associated offense is murder.”  
27 Mendoza, 122 Nev. at 275 n.19 , 130 P.3d at 180 n.19.

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1                   Nor does it seem that Petitioner is claiming that he is actually innocent. Instead, he is  
2 really just attacking the legal sufficiency of his conviction. As explained by the United States  
3 Supreme Court, actual innocence means factual innocence not mere legal insufficiency.  
4 Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley,  
5 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992).

6                   Actual innocence is a stringent standard designed to be applied only in the most  
7 extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530. The United States Court  
8 of Appeals for the Eighth Circuit has “rejected free-standing claims of actual innocence as a  
9 basis for habeas review stating, ‘[c]laims of actual innocence based on newly discovered  
10 evidence have never been held to state a ground for federal habeas relief absent an independent  
11 constitutional violation occurring in the underlying state criminal proceeding.’” Meadows v.  
12 Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S.Ct.  
13 853, 860 (1993)). To establish actual innocence of a crime, a petitioner “must show that it is  
14 more likely than not that *no reasonable juror* would have convicted him absent a constitutional  
15 violation.” Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (emphasis added). However, “[w]ithout  
16 any new evidence of innocence, even the existence of a concededly meritorious constitutional  
17 violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas  
18 court to reach the merits of the barred claim.” Schlup v. Delo, 513 U.S. 298, 316, 115 S.Ct.  
19 851, 861 (1995).

20                   Once a defendant has made such a showing, he may then use the claim of actual  
21 innocence as a “gateway” to present his constitutional challenges to the court and require the  
22 court to decide them on the merits. Schlup, 513 U.S. at 315, 115 S.Ct. at 861. Furthermore,  
23 the newly discovered evidence suggesting the defendant’s innocence must be “so strong that  
24 a court cannot have confidence in the outcome of the trial.” Id. at 316, 115 S.Ct. at 861.

25                   Petitioner has provided no new facts or evidence to show that he is actually innocent of  
26 the kidnapping crime sufficient to overcome the many bars to this claim. His assertion is  
27 therefore bare and naked under Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, the  
28 instant Third Amended Petition is denied as to this claim.

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1                   **F. The grounds that petitioner says he will supplement in the future are also**  
2                   **procedurally barred.**

3                   On the last page of the Third Amended Petition, Petitioner says that he will raise several  
4                   new grounds in a subsequent filing. Third Amended Petition at 34. Each of the grounds that  
5                   he claims he will address on page 34 are similarly procedurally barred. Ground 3, which claims  
6                   that his trial counsel was ineffective by using peremptory challenges on male veniremen, is  
7                   untimely. Ground 4 claims that the district court committed structural error by failing to apply  
8                   Batson's three-step analysis. Ground 5 claims that his counsel was ineffective both at trial and  
9                   on appeal. Ground 6 claims that his counsel was ineffective for failing to object to jury  
10                  instructions, ask for an instruction on voluntary intoxication, or show that he had a "reasonable  
11                  probability of success" under Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).  
12                  Ground 7 claims that Petitioner's right to due process was violated by "blatant references to  
13                  uncharged and false claims of prior bad acts of domestic violence." Third Amended Petition  
14                  at 34. These claims fall well outside of the mandatory time limits of NRS 34.726, and are  
15                  successive under NRS 34.810(2). Furthermore, Petitioner cannot show good cause for raising  
16                  these claims, as the underlying law and facts of each of these claims which Petitioner says he  
17                  will supplement have been available to him for years. Furthermore, Grounds 4 and 7 are  
18                  inappropriate for habeas review under NRS 34.810(1).

19                  For the reasons stated herein, Petitioner has failed to show that good cause or prejudice  
20                  to overcome any of the many procedural bars against his claims. Accordingly, the Third  
21                  Amended Petition is denied.

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## ORDER

**THEREFORE, IT IS HEREBY ORDERED** that the Amended Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and is, denied.

DATED this 28 day of January, 2019.

**DISTRICT JUDGE**

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

BY

for

EKATERINA DELCAVINA  
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