

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. BYRMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER DENYING PETITION FOR REVIEW

Review denied. NRAP 40B.¹

It is so ORDERED.

Pickering, C.J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

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

E13

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

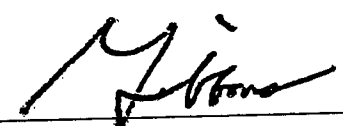
ELIZABETH A. BROWN
CLERK OF SUPREME COURT


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

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. Young
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.¹ *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

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

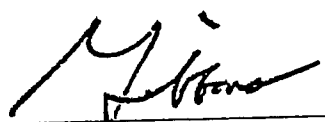
34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Guerrero was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2). To warrant an evidentiary hearing, petitioner must raise claims supported by specific factual allegations that 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

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

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Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

FCCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
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200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

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**

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

Law:

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H.23

1 **FINDINGS OF FACT**

2 **CONCLUSIONS OF LAW**

3 On January 14, 2002, the State of Nevada (hereinafter "State") filed an Information
4 charging Pablo Guerrero with the following: Count 1 – Burglary (Felony – NRS 205.060);
5 Count 2 – Child Abuse and Neglect (Gross Misdemeanor – NRS 200.508); Count 3 –
6 Preventing or Dissuading Victim from Reporting Crime (Felony – NRS 199.305); Count 4 –
7 Sexual Assault (Felony – NRS 200.364, 200.366); Count 5 – Conspiracy to Commit Burglary
8 (Felony – NRS 199.480, 205.060); Counts 6 and 7 – Burglary while in Possession of a Firearm
9 (Felony – NRS 205.060); Count 8 – Conspiracy to Commit Kidnapping (Felony – NRS
10 199.480, 200.310, 200.320); Count 9 – First Degree Kidnapping with Use of a Deadly Weapon
11 (Felony – NRS 200.310, 200.320, 193.165); Count 10 – First Degree Kidnapping with Use of
12 a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS 200.310, 200.320,
13 193.165, 0.060); Count 11 – Conspiracy to Commit Murder (Open Murder) (Felony – NRS
14 199.480, 200.010, 193.165); Count 12 – Attempt Murder with Use of a Deadly Weapon
15 Resulting in Substantial Bodily Harm (Felony – NRS 193.330, 200.010, 200.030, 193.165,
16 0.060); Count 13 – Conspiracy to Commit Robbery with Use of a Deadly Weapon (Felony –
17 NRS 199.480, 200.380, 193.165); Count 14 – Robbery with Use of a Deadly Weapon (Felony
18 – NRS 200.380, 193.165); and Count 15 – Grand Larceny (Felony – NRS 205.220, 205.222).

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

22 On March 1, 2004, Guerrero appeared for sentencing. Prior to adjudging Guerrero
23 guilty, this Court dismissed Count 1 – Burglary and Count 6 – Burglary while in Possession
24 of a Firearm as duplicitous. Thereafter, this Court sentenced Guerrero as follows: Count 3 –
25 a minimum of 12 months and a maximum of 34 months in the Nevada Department of
26 Corrections (hereinafter "NDC"); Count 4 – a minimum of one 120 months to a maximum of
27 life in the NDC; Count 5 – 12 months in the Clark County Detention Center; Count 7 – a
28 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 3rd 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.

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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

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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H.29

ARGUMENT

I. 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.

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H.32

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

2 NRS 34.810(1) reads:

3 The court shall dismiss a petition if the court determines that:
4 ...

5 (b) The petitioner's conviction was the result of a trial and the grounds
6 for the petition could have been:
7 ...

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

10 In applying this statute, the Nevada Supreme Court has held that "challenges to the
11 validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must
12 first be pursued in post-conviction proceedings...[A]ll other claims that are appropriate for a
13 direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent
14 proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis
15 added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222
16 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could
17 have been presented in an earlier proceeding, unless the court finds both cause for failing to
18 present the claims earlier or for raising them again and actual prejudice to the petitioner."
19 Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

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

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

25 A showing of good cause and prejudice may overcome procedural bars. "To establish
26 good cause, appellants *must* show that an impediment external to the defense prevented their
27 compliance with the applicable procedural rule. A qualifying impediment might be shown
28 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 Fraday, 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
24 denied as to this claim.

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

28 Petitioner then claims that his counsel was ineffective for failing to argue that because
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.

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.

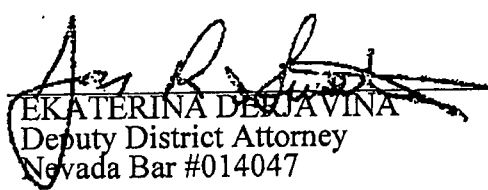
DATED this 28 day of January, 2019.


DISTRICT JUDGE

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

BY

for


EKATERINA DERJAVINA
Deputy District Attorney
Nevada Bar #014047

hjc/SVU

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