

# APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY HOWARD JOHNSON,  
Appellant,  
vs.  
RENEE BAKER, WARDEN,  
LOVELOCK CORRECTIONAL  
CENTER,  
Respondent.

No. 80279

**FILED**

**FEB 16 2021**

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

*ORDER OF AFFIRMANCE*

This is a pro se appeal from a district court order denying a postconviction petition for a writ of habeas corpus.<sup>1</sup> Second Judicial District Court, Washoe County; Lynne K. Simons, Judge. Appellant Timothy Howard Johnson argues that the district court erred in denying his petition as procedurally barred. We affirm.

Johnson filed the petition 30 years after remittitur issued on his direct appeal. *Johnson v. State*, Docket No. 18178 (Order Dismissing Appeal, March 30, 1988). Thus, his petition was untimely filed.<sup>2</sup> See NRS 34.726(1). Johnson'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>Having considered appellant's pro se brief, we conclude that a response is not necessary. NRAP 46A(c). This appeal therefore has been submitted for decision based on the pro se brief and the record. See NRAP 34(f)(3).

<sup>2</sup>The petition was also untimely from the January 1, 1993, effective date of NRS 34.726(1). See *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1098 n.12 (2018).

34.810(3). Good cause may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to be raised in a timely petition and that the petitioner raised the claim within a reasonable time after the factual or legal basis for it became available. *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).

Johnson argues that the Supreme Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), provides good cause. He is mistaken, as *McCoy* is distinguishable. *McCoy* holds that an attorney may not concede a defendant's guilt of a charged crime where the defendant expressly objects or insists on maintaining his or her innocence. 138 S. Ct. at 1509. Here, Johnson represented himself at trial with the assistance of standby counsel, who did not concede his guilt to the jury. Johnson's contention that he elected to represent himself rather than proceed to trial with the assistance of attorneys who wanted to concede guilt to lesser offenses does not bring his case within *McCoy*'s narrow scope, which does not encompass the decision to represent oneself. *See id.* at 1507-08 (differentiating a defendant electing to proceed pro se from a defendant receiving assistance from counsel that must not violate a defendant's fundamental objectives of the defense). Insofar as Johnson contends that his decision to proceed pro se was coerced and that his canvass pursuant to *Faretta v. California*, 422 U.S. 806 (1975), was improper, such claims were reasonably available to be raised in a timely petition, and he did not allege good cause to excuse the delay. Because *McCoy* is distinguishable, we need not decide whether *McCoy* applies retroactively. Accordingly, Johnson has not shown that *McCoy* provides good cause, and the district court correctly applied the mandatory procedural bars. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

Having considered Johnson's contentions and concluded that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.

Cadish, J.  
Cadish

Pickering, J.  
Pickering

Herndon, J.  
Herndon

cc: Hon. Lynne K. Simons, District Judge  
Timothy Howard Johnson  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

TIMOTHY HOWARD JOHNSON,  
Appellant,  
vs.  
RENEE BAKER, WARDEN, LOVELOCK  
CORRECTIONAL CENTER,  
Respondent.

**Supreme Court No. 80279**  
District Court Case No. C861138

**REMITTITUR**

TO: Jacqueline Bryant, Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: March 15, 2021

Elizabeth A. Brown, Clerk of Court

By: Kaitlin Meetze  
Administrative Assistant

cc (without enclosures):

Hon. Lynne K. Simons, District Judge  
Timothy Howard Johnson  
Washoe County District Attorney \ Jennifer P. Noble

**RECEIPT FOR REMITTITUR**

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on \_\_\_\_\_.

\_\_\_\_\_  
District Court Clerk

## APPENDIX B

1 CODE NO.

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE  
8

9 TIMOTHY HOWARD JOHNSON,

Case No. C86-1138

10 Petitioner,

Dept. No. 6

11 vs.

12 RENEE BAKER, WARDEN, LOVELOCK  
13 CORRECTIONAL CENTER,

14 Respondents.  
15 \_\_\_\_\_

16 **ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS**

17 Petitioner TIMOTHY HOWARD JOHNSON ("Mr. Johnson") filed his current *Petition*  
18 *for Writ of Habeas Corpus (Post-Conviction)* ("Petition") on March 1, 2019. Thereafter, the  
19 Court entered its *Order to Respond* on March 25, 2019. The STATE OF NEVADA ("the  
20 State") filed its *Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)*  
21 ("Motion") which is now before the Court. Thereafter, Mr. Johnson filed his *Opposition to*  
22 *Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)* ("Opposition"). The  
23 State did not file any additional papers, and the matter was submitted for decision.  
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1 **I. FACTS AND PROCEDURAL HISTORY.**

2 This *Petition* arises out of the *Judgment of Conviction* entered in this proceeding on  
3 March 19, 1987. Mr. Johnson was convicted of Murder in the First Degree with the Use of a  
4 Deadly Weapon and sentenced to life without the possibility of parole with an additional  
5 consecutive life sentence for the deadly weapon enhancement. See *Judgment of*  
6 *Conviction*. Mr. Johnson filed his *Notice of Appeal* to the Nevada Supreme Court on April  
7 13, 1987. Subsequently, the Nevada Supreme Court dismissed the appeal, issuing its  
8 *Order Dismissing Appeal*.<sup>1</sup>

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10 **CV89-1711.** On March 27, 1989, Mr. Johnson filed his first *Petition for Post-*  
11 *Conviction Relief* in CV89-1711. Decades later, Mr. Johnson filed a *Second Amended*  
12 *Petition for Writ of Habeas Corpus* on February 7, 2013. Counsel was appointed, and a  
13 *Supplemental Petition for Writ of Habeas Corpus* was filed on May 28, 2014. The State filed  
14 its *Motion to Dismiss the Petition and Supplemental Petition* on July 7, 2014. The Court  
15 entered its *Order Granting Motion to Dismiss* on August 22, 2014. On review, the Nevada  
16 Supreme Court entered its *Order of Affirmance* on March 11, 2015 which was filed with this  
17 Court on April 9, 2015.

18 **C86-1138.** Recently, Mr. Johnson filed two *Petitions for Writ of Habeas Corpus*: one  
19 in C86-1138 and another in CV19-00044. The Court entered its *Order Directing Transfer of*  
20 *Docket and Closure of Case* for the *Petition* filed in CV19-00044 and merged the filings into  
21 C86-1138. Therefore, both *Petitions* are currently pending in the instant case (collectively  
22 "*Petition*").

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28 <sup>1</sup> Timothy Howard Johnson vs. The State of Nevada, Docket No. 18178 (*Order Dismissing Appeal*,  
March 30, 1988).

1 The *Petition* under consideration now challenges the *Judgment of Conviction*,  
2 alleging two grounds for relief: (1) The judgment of conviction is void, and Mr. Johnson  
3 should be discharged pursuant to NRS 34.480 and/or NRS 34.640; and (2) the United  
4 States Supreme Court's holding in McCoy v. Louisiana, 138 S. Ct. 1500 (2018) retroactively  
5 applies to this proceeding and *Petition*, thereby allowing Mr. Johnson to overcome any  
6 procedural bars. In response to the *Petition*, the State filed its *Motion* on July 19, 2019  
7 seeking dismissal because Mr. Johnson was not represented by counsel at trial, thereby  
8 precluding application of McCoy.  
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10 With the foregoing procedural history in mind, the Court turns to the merits of the  
11 *Petition* and addresses each ground for relief below.  
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## 13 II. APPLICABLE LAW AND ANALYSIS.

### 14 A. GROUND ONE

15 Mr. Johnson contends his *Judgment of Conviction* in C86-1138 is void because the  
16 Court exceeded its jurisdiction by failing to appoint a new public defender to represent him  
17 pursuant to NRS 171.188(3)(b). *Petition*, p. 11. Mr. Johnson predicates Ground One on a  
18 confusing collection of void judgment legal standards applicable in federal civil, bankruptcy,  
19 and criminal cases. *Petition*, p. 7-10.  
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21 Mr. Johnson relies heavily on Ex parte Dela, 25 Nev. 346, 60 P. 217, 219 (1900)  
22 where the Nevada Supreme Court held a Court shall ascertain whether judgment is void by  
23 determining whether the Court exceeded its jurisdiction, and whether the process issued  
24 upon such judgment is void. *Petition*, p. 10-11. Mr. Johnson also relies on the holding in  
25 Johnson v. Zerbst, 58 S. Ct. 1019, 1025 (1938) where the United States Supreme Court  
26 held a judgment of conviction is void if the accused is not represented by counsel. *Petition*,  
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1 p. 10. Mr. Johnson argues the United States Supreme Court also held a judgment of  
2 conviction is void if the accused did not competently and intelligently waive his constitutional  
3 rights. *Petition*, p. 10.

4 After review of the record, this Court finds the process followed by the Court did not  
5 vitiate its jurisdiction. As the Ninth Circuit Court of Appeals has held: once a defendant  
6 makes an unequivocal request to proceed *pro se*, a court must hold a Faretta hearing to  
7 determine whether defendant is knowingly and intelligently waiving his right to appointed  
8 counsel. United States v. Audette, 923 F.3d 1227 (9th Cir. 2019) (referencing Faretta v.  
9 California, 95 S. Ct. 2525, 2541 (1975)). In this case, the Court immediately conducted a  
10 Faretta canvass of Mr. Johnson, in which he competently and intelligently elected to  
11 represent himself and receive technical advice from the Washoe County Public Defender's  
12 Office. *Transcript of Proceedings*, Sealed Portion, Feb. 18, 1987, p. 31:6-7; *Transcript of*  
13 *Proceedings*, Unsealed Portion, Feb. 18, 1987, p. 26:16-21, 32:17-25, 33:1-4. Hence, Mr.  
14 Johnson's volitional decisions do not warrant relief under Ex parte Dela, 25 Nev. at 346 or  
15 Johnson, 58 S. Ct. at 1025.

16 Therefore, the Court finds Mr. Johnson fails to establish the Court exceeded its  
17 jurisdiction by declining to appoint a new deputy public defender pursuant to NRS  
18 171.188(3)(b). Accordingly, the Court finds Ground One of the *Petition* should be  
19 dismissed.

## 20 B. GROUND TWO

21 Mr. Johnson asserts the United States Supreme Court's holding in McCoy, 138 S. Ct.  
22 at 1500, should retroactively apply to his *Petition*.<sup>2</sup> *Petition*, p. 11. In McCoy, the United  
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<sup>2</sup> Because Mr. Johnson asserts McCoy applies retroactively, the Court does not do a successive  
petition analysis here.

1 States Supreme Court held "[w]hen a client expressly asserts that the objective of 'his  
2 defense' is to maintain innocence of the charged criminal acts, his lawyer must abide by that  
3 objective and may not override it by conceding guilt." 138 S. Ct. at 1509.

4 Specifically, Mr. Johnson claims his counsel refused to present his defense of  
5 innocence to the first-degree murder charge after withdrawing from representation of Mr.  
6 Johnson due to ethical concerns. *Petition*, p. 12. Such a withdrawal, posits Mr. Johnson,  
7 constitutes a structural error which undermined his counsels' duty to develop a trial strategy  
8 most reflective of Mr. Johnson's innocence. *Petition*, p. 13-14.

9 The extent of McCoy's applicability, and the question of its retroactivity, are the  
10 subjects of other cases recently litigated in Nevada. See, e.g., Moore v. State, 77803-COA,  
11 2019 WL 4689157, at \*1 (Nev. App. Sept. 25, 2019) (finding McCoy did not apply to  
12 petitioner, assuming its retroactivity, after agreeing with counsel's trial strategy to admit guilt  
13 to felony murder to avoid death sentence); Howard v. Baker, 316CV00631RCJCBC, 2019  
14 WL 4346573, at \*2 (D. Nev. Sept. 12, 2019) (explaining the Court's inability to evaluate  
15 petitioner's McCoy claim due to the unsettled scope of its retroactivity); Pritchett v. Gentry,  
16 217CV01694JADCWH, 2019 WL 2503944, at \*1 (D. Nev. June 17, 2019) (also explaining  
17 the Court's inability to evaluate petitioner's McCoy claim due to the unsettled scope of its  
18 retroactivity).

19 Even considering, without deciding, the McCoy holding must be applied retroactively  
20 and would confirm good cause for his *Petition*, Mr. Johnson cannot establish its applicability.  
21 Unlike the petitioner in McCoy, Mr. Johnson articulately expressed on the record, prior to his  
22 trial, he desired to and would represent himself with technical advice from counsel.  
23 *Transcript of Proceedings*, Sealed Portion, Feb. 18, 1987, p. 31:6-7; *Transcript of*  
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1 *Proceedings, Unsealed Portion, Feb. 18, 1987, p. 26:16-21, 32:17-25, 33:1-4. By*  
2 *representing himself at trial, he had no attorney to concede his guilt to the jury over his*  
3 *objection. Distinctive from Mr. Johnson's circumstances, McCoy applies to counsel-*  
4 *represented persons during trial and not to self-represented litigants.*

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6 Therefore, the Court finds Mr. Johnson fails to establish retroactive application of  
7 McCoy is legally appropriate in this case. Accordingly, the Court finds Ground Two of the  
8 *Petition* should be dismissed.

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10 **III. CONCLUSION AND ORDER.**

11 Based on the foregoing, the Court concludes Mr. Johnson has failed to demonstrate  
12 a legal basis for post-conviction relief.

13 As such, the Court finds Respondent's *Motion* should be granted.

14 Accordingly, and good cause appearing,

15 **IT IS HEREBY ORDERED** the State's *Motion to Dismiss Petition for Writ of Habeas*  
16 *Corpus (Post-Conviction)* is **GRANTED**.

17 Dated this 10<sup>th</sup> day of December, 2019.

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21 DISTRICT JUDGE  
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CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;  
that on the 10<sup>th</sup> day of December, 2019, I electronically filed the foregoing with the  
Clerk of the Court system which will send a notice of electronic filing to the following:

KEVIN NAUGHTON, ESQ.

And, I deposited in the County mailing system for postage and mailing with the  
United States Postal Service in Reno, Nevada, a true and correct copy of the attached  
document addressed as follows:

Timothy Howard Johnson, #23766  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, NV 89419

Hadi Boe

CR86-1138

APPENDIX B, P. 7

## APPENDIX C

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

FEB 18 2021

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

TIMOTHY H. JOHNSON,

No. 19-70976

Applicant,

ORDER

v.

RENEE BAKER, Warden,

Respondent.

Before: FERNANDEZ, BYBEE, and BADE, Circuit Judges.

The stay of this action, entered on March 5, 2020, is lifted.

The application for authorization to file a second or successive 28 U.S.C.

§ 2254 habeas corpus petition in the district court is denied. The applicant has not made a prima facie showing under 28 U.S.C. § 2244(b)(2) that:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

*See Christian v. Thomas*, 982 F.3d 1215, 1224-25 (9th Cir. 2020) (holding that the

Supreme Court has not made *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018),

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retroactive to cases on collateral review).

Any pending motions are denied as moot.

No further filings will be entertained in this case.

**DENIED.**

**Additional material  
from this filing is  
available in the  
Clerk's Office.**