

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

AUG 18 2021

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

JOHNNY EDWARD MCMAHON,

No. 21-70935

Applicant,

ORDER

v.

PERRY RUSSELL,

Respondent.

Before: SILVERMAN, CHRISTEN, and LEE, Circuit Judges.

The court has reviewed the application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court, as supplemented by the applicant's filings at Docket Entry Nos. 2 and 3. Insofar as the applicant raises claims that were raised in a 28 U.S.C. § 2254 habeas corpus petition filed in United States District Court for the District of Nevada case number 2:14-cv-00076-APG-CWH, decided on September 29, 2017, we dismiss those claims. *See* 28 U.S.C. § 2244(b)(1); *Chades v. Hill*, 976 F.3d 1055, 1056 (9th Cir. 2020) (stating that this court may not authorize a claim barred by § 2244(b)(1)).

With respect to all remaining claims, the application 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.

To the extent the applicant contends that his petition is not second or successive because he alleges fraud under Federal Rule of Civil Procedure 60(b)(6) and (d)(3), we lack jurisdiction to consider this contention in the first instance. *See* 28 U.S.C. § 1291 (courts of appeals “have jurisdiction of appeals from all final decisions of the district courts of the United States”).

Any pending motions or requests are denied as moot.

No further filings will be entertained in this case.

**DENIED.**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

3 JOHNNY EDWARD MCMAHON,  
4 Petitioner  
5 v.  
6 NEVEN, et al.,  
7 Respondents

Case No.: 2:14-cv-00076-APG-CWH

**Order**

9 I dismissed petitioner Johnny Edward McMahon's habeas corpus petition with prejudice  
10 in September 2017 and judgment was entered. ECF Nos. 73, 74. McMahon appealed but the  
11 Ninth Circuit Court of Appeals denied a certificate of appealability. ECF Nos. 75, 77.

12 In January 2021, I denied McMahon's motion for relief from judgment and motion for  
13 recusal of me. ECF No. 90. McMahon now moves to reopen the case and again moves to recuse  
14 me. ECF Nos. 94, 95. He presents no new or compelling arguments and there is no basis to  
15 reopen this case. The motions are denied.

16 I THEREFORE ORDER that the petitioner's motion for recusal of district judge and  
17 motion to reopen the case (ECF Nos. 94 and 95) are both DENIED.

18 I FURTHER ORDER that a certificate of appealability is denied.

19 Dated: April 16, 2021

---

U.S. District Judge Andrew P. Gordon

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHNNY EDWARD MCMAHON,  
Petitioner,  
vs.  
JENNIFER MCCAIN DUNBAR; AND  
THE STATE OF NEVADA,  
Respondents.

No. 81766-COA

**FILED**

OCT 16 2020

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

*ORDER DENYING PETITION*

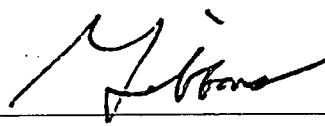
*FOR WRIT OF MANDAMUS*

This is an original petition for a writ of mandamus seeking, among other things, an order directing respondents to notarize a power of attorney form.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). But writ relief is typically not available when the petitioner has a plain, speedy, and adequate remedy at law. *See* NRS 34.170; *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. Moreover, whether such a petition will be considered rests within our sound discretion. *See Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Petitioner bears the burden of demonstrating that extraordinary relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Here, a review of this petition demonstrates that petitioner has a speedy and adequate remedy available in that he can seek relief in the district court and, if aggrieved, can then appeal any adverse judgment to the appellate courts. *See Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (applying this rule to a case where there were disputed factual issues relevant to demonstrating the propriety of writ relief). Accordingly, we decline to consider this petition, and we therefore deny it. *See Smith*, 107 Nev. at 677, 818 P.2d at 851; NRAP 21(b)(1).

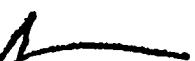
It is so ORDERED.



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



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



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

cc: Johnny Edward McMahon  
Attorney General/Carson City

APPENDIX E

1

2

3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

5 \* \* \*

6 JOHNNY EDWARD MCMAHON,

Case No. 3:20-cv-00453-MMD-WGC

7 Petitioner,

ORDER

8

9 PERRY RUSSELL, *et al.*,

10 Respondents.

11

12 Petitioner Johnny Edward McMahon initiated this habeas corpus action. (ECF No.  
13 1-1.) However, it appears that he intended to file this as a motion for relief from judgment  
14 pursuant to Federal Rule of Civil Procedure 60(b) in his earlier-filed habeas petition in  
15 Case No. 2:14-cv-00076-APG-CWH. Accordingly, the Court directs the Clerk of Court to  
16 close this case and file the Rule 60(b) motion (ECF No. 7), as well as the motion for  
17 counsel (ECF No. 6), in Petitioner's earlier-filed action.

18 It is therefore ordered that Petitioner's application to proceed in forma pauperis  
19 (ECF No. 1) is denied as moot.

20 It is further ordered that the Clerk of Court file Petitioner's motion for counsel (ECF  
21 No. 6) and motion to set aside verdict pursuant to FRCP 60(b)(6) (ECF No. 7) in Case  
22 No. 2:14-cv-00076-APG-CWH.

23 It is further ordered that the Clerk of Court close this case.

24 It is further ordered that a certificate of appealability is denied.

25 DATED THIS 24<sup>th</sup> day of September 2020.

26

27

28



MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE

## IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHNNY EDWARD MCMAHON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79156-COA

FILED

JUN 12 2020

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

***ORDER OF AFFIRMANCE***

Johnny Edward McMahon appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

McMahon filed his petition on March 1, 2019, more than nine years after issuance of the remittitur on direct appeal on December 22, 2009. *See McMahon v. State*, Docket No. 52071 (Order of Affirmance, October 16, 2009). Thus, McMahon's petition was untimely filed. *See* NRS 34.726(1). Moreover, McMahon'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). McMahon's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically

<sup>1</sup>*McMahon v. State*, Docket No. 65437 (Order of Affirmance and Dismissing Appeal in Part, September 16, 2014); *McMahon v. State*, Docket No. 60247 (Order of Affirmance, June 13, 2013).

pledged laches, McMahon was required to overcome the rebuttable presumption of prejudice to the State. *See NRS 34.800(2).*

McMahon contended the procedural bars did not apply because he challenged the district court's subject matter jurisdiction and asserted he may raise claims alleging fraud upon the court at any time. However, McMahon's claims did not implicate the jurisdiction of the district court. *See Nev. Const. art. 6, § 6; NRS 171.010.* Moreover, "[a]pplication of the statutory procedural default rules to postconviction habeas petitions is mandatory." *See State v. Eighth Judicial Dist. Court (Riker),* 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). Therefore, McMahon's claims alleging fraud upon the court were subject to the procedural bars and McMahon failed to demonstrate an impediment external to the defense prevented him from raising his claims in a timely-filed petition. In addition, McMahon did not overcome the presumption of prejudice to the State. Accordingly, we conclude the district court did not err by denying the petition as procedurally barred.

Next, McMahon contends the district court erred by denying the petition without conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific allegations not belied by the record, and if true, would entitle him to relief. *Rubio v. State,* 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008) (noting a district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars). Because McMahon did not demonstrate good cause, he fails to demonstrate the district court erred by declining to conduct an evidentiary hearing concerning his procedurally-

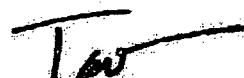
barred claims. Therefore, McMahon is not entitled to relief based upon this claim.

Finally, McMahon appears to argue the district court erred by adopting the State's proposed order denying his petition. McMahon does not identify any legal reason why the district court should not have adopted the proposed draft order. Moreover, McMahon does not demonstrate the adoption of the proposed order adversely affected the outcome of the proceedings or his ability to seek full appellate review. Therefore, McMahon fails to demonstrate he is entitled to relief based upon this claim, and we

ORDER the judgment of the district court AFFIRMED.



C.J.  
Gibbons



J.  
Tao



J.  
Bulla

cc: Hon. William D. Kephart, District Judge  
Johnny Edward McMahon  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

APPENDIX G

Electronically Filed  
7/1/2019 9:41 AM  
Steven D. Grierson  
CLERK OF THE COURT

*Steven D. Grierson*

1 RSPN  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 JAMES R. SWEETIN  
6 Chief Deputy District Attorney  
7 Nevada Bar #005144  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
(702) 671-2500  
10 Attorney for Plaintiff

7 DISTRICT COURT  
8  
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 JOHNNY MCMAHON,  
14 #0306261

15 Defendant.

CASE NO: A-19-790328-W  
06C220825

DEPT NO: XIX

16 FINDINGS OF FACT, CONCLUSIONS

17 OF LAW AND ORDER

18 DATE OF HEARING: JANUARY 22, 2019  
19 TIME OF HEARING: 8:30 AM

20 This matter having come on for hearing before the Honorable WILLIAM KEPHART,  
21 District Judge; Defendant not being present, in PROPER PERSON; the State being  
22 represented by STEVEN B. WOLFSON, District Attorney, through BERNARD  
23 ZADROWSKI, Chief Deputy District Attorney; and having considered the matter, including  
24 briefs, arguments of counsel, and documents on file herein, the Court makes the following  
25 Findings of Fact and Conclusions of Law:

26 //  
27 //  
28 //

## **PROCEDURAL HISTORY**

On April 6, 2006, Johnny McMahon (hereinafter "Defendant") was charged by way of Information with: Counts 1, 3 and 5 – Sexual Assault with a Minor under Sixteen Years of Age (Category A Felony – NRS 200.364, 200.366); Counts 2, 4, and 6 – Statutory Sexual Seduction (Category C Felony – NRS 200.364, 200.368); and Count 7 – Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210).

Defendant's jury trial began on May 5, 2008 and concluded on May 7, 2008. On May 7, 2008, the jury found Defendant guilty of all charges. Defendant subsequently filed a Motion for a New Trial and the State filed its Opposition on July 10, 2008. Defendant's motion was denied on July 21, 2008.

On July 11, 2008, Defendant was present in court with counsel and sentenced as follows: as to Count 1 – life imprisonment with parole eligibility beginning after twenty (20) years; as to Count 3 – life imprisonment with parole eligibility beginning after twenty (20) years, as to Count 5 – life imprisonment with parole eligibility beginning after twenty (20) years; and as to Count 7 – twelve (12) months incarceration. All counts were to run concurrently with one another. The district court struck Counts 2, 4, and 6. Defendant was further ordered a special sentence of lifetime supervision and ordered to register as a sex offender in accordance with NRS 179D.460. He was given sixty-nine (69) days credit for time served. The Judgment of Conviction was filed on July 29, 2008.

Defendant filed a Notice of Appeal on July 16, 2008. On September 22, 2008, Paul Wommer, Defendant's trial counsel, was appointed to represent Defendant on appeal. The Nevada Supreme Court affirmed Defendant's Judgment of Conviction on October 16, 2009. Remittitur issued on December 29, 2009.

Defendant filed a Motion for Appointment of Counsel and Request for Evidentiary Hearing Due to Conflict of Interest on October 7, 2008. The State filed its Opposition on October 15, 2008. However, all proceedings were stayed during the pendency of Defendant's direct appeal because the district court did not have jurisdiction to entertain the motions. On January 6, 2010, Defendant's motion to withdraw his counsel due to conflict was granted and

1 his motion for appointment of counsel and request for evidentiary hearing was denied.

2       Defendant filed a Motion for Chief Judge of Eighth Judicial District Court to Call the  
3 Record, Motion to Dismiss Judgment of Conviction for Lack of Jurisdiction, and Motion to  
4 Withdrawal or Recuse Judge Barker from Clerk (sic) on April 23, 2010. The State filed its  
5 Opposition on May 13, 2010.

6       On May 6, 2010, Defendant filed a Motion to Recuse Eighth Judicial District Court  
7 Honorable Judge David Barker and a Motion to Dismiss Judgment of Conviction for Lack of  
8 Jurisdiction. The State filed its Opposition to Defendant's motion on May 20, 2010. On May  
9 21, 2010, the Honorable District Court Judge David Barker referred the motion to disqualify  
10 to Chief Judge Ritchie. Defendant filed a reply to the State's Opposition on May 25, 2010.  
11 Chief Judge Ritchie ultimately denied Defendant's request to recuse Judge Barker on May 28,  
12 2010.

13       Defendant filed a Motion to Appoint Counsel on May 17, 2010. In the meantime,  
14 Defendant filed a Pro Per Petition for Writ of Habeas Corpus on May 21, 2010 ("First State  
15 Petition"). The State filed its Opposition to Motion to Appoint Counsel on May 25, 2010. On  
16 June 4, 2010, the district court appointed Rochelle Nguyen, Esq. as counsel of record.

17       On June 8, 2010, Defendant filed a Motion to Produce Arrest Warrant of April 2005.  
18 On the same date, Defendant filed a Motion to Strike State's Response to Petitioner's Motion  
19 to Dismiss Judgment of Conviction for Lack of Jurisdiction and Motion to Withdrawal or  
20 Recuse Eighth Judicial District Court Judge Honorable David Barker.

21       At a hearing on August 18, 2010, the Court directed Defendant's counsel to review  
22 Defendant's various pro per motions and decide which were appropriate to condense and put  
23 back on calendar. The Court subsequently ordered a briefing schedule to allow Defendant's  
24 counsel to file a supplement that encompassed the appropriate issues counsel was requested to  
25 place back on calendar.

26       Defendant filed a Supplement to his Petition for Writ of Habeas Corpus on March 22,  
27 2011. The State filed its Response on May 23, 2011. Defendant filed a Reply to the State's  
28 Response on June 22, 2011.

1 An Evidentiary Hearing was held on the Petition on December 16, 2011. On February  
2 1, 2012, the court issued, in Open Court, a Findings of Fact, Conclusions of Law and Order  
3 denying Defendant's Petition. On February 14, 2012, a Notice of Entry of Decision and Order  
4 was filed.

5 On February 13, 2012, Defendant filed a Notice of Appeal. On June 13, 2013, the  
6 Nevada Supreme Court affirmed the district court's order. Remittitur issued on July 10, 2013.

7 Defendant filed a late, successive Petition for Writ of Habeas Corpus (“Second State  
8 Petition”) on April 24, 2013. The State filed its Response and Motion to Dismiss Defendant’s  
9 Second State Petition on June 26, 2013. On July 2, 2013, Defendant filed a Motion to for  
10 Leave to File Amended Petition for Habeas Corpus, which also included a “Supplement” to  
11 his Second State Petition. On July 8, 2013, the district court granted Defendant’s Motion for  
12 leave to amend his Second State Petition. On September 5, 2013, the State filed its Response  
13 to Defendant’s Supplement to the Second State Petition. On September 13, 2013, Defendant  
14 filed his Amended Second State Petition. The State filed its Response on October 28, 2013.  
15 The district court denied Defendant’s Petition on March 13, 2014. On April 11, 2014,  
16 Defendant filed a Notice of Appeal. On October 10, 2014, the Nevada Supreme Court affirmed  
17 the district court’s denial of Defendant’s Petition. On March 1, 2019, Defendant filed a Third  
18 Petition for Writ of Habeas Corpus (“Third Petition”). On April 16, 2019, the State filed a  
19 response. On May 13, 2019, this court held a hearing on Defendant’s Third Petition.

## ANALYSIS

## I. DEFENDANT'S PETITION IS PROCEDURALLY BARRED

**a. The procedural bars are mandatory**

23 The Nevada Supreme Court has held that “[a]pplication of the statutory procedural  
24 default rules to post-conviction habeas petitions is *mandatory*,” noting:

25 Habeas corpus petitions that are filed many years after conviction  
26 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.

27 //  
28 //

1       State v. Dist. Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005) (emphasis added).  
2       Additionally, the Court noted that procedural bars “cannot be ignored [by the district court]  
3       when properly raised by the State.” Id. at 233, 112 P.3d at 1075; see also State v. Greene, 129  
4       Nev. 559, 566, 307 P.3d 322, 326 (2013) (reiterating that absent a showing of good cause and  
5       prejudice, the procedural default rules are mandatory). The Nevada Supreme Court has granted  
6       no discretion to the district courts regarding whether to apply the statutory procedural bars;  
7       the rules *must* be applied. For the reasons discussed below, Defendant’s Petition must be  
8       dismissed.

9       **b. Defendant’s Third Petition is time-barred**

10      The mandatory provision of NRS 34.726(1) states:

11      Unless there is good cause shown for delay, a petition that  
12       challenges the validity of a judgment or sentence must be filed  
13       *within 1 year after entry of the judgment of conviction* or, if an  
14       appeal has been taken from the judgment, *within 1 year after the  
Supreme Court issues its remittitur*. For the purposes of this  
15       subsection, good cause for delay exists if the petitioner  
demonstrates to the satisfaction of the court:

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

19      (emphasis added). “[T]he statutory rules regarding procedural default are mandatory and  
20       cannot be ignored when properly raised by the State.” Riker, 121 Nev. at 233, 112 P.3d at  
21       1075.

22      Accordingly, the one-year time bar prescribed by NRS 34.726 begins to run from the  
23       date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.  
24       Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v.  
25       State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be  
construed by its plain meaning).

26      In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada  
27       Supreme Court affirmed the rejection of a habeas petition that was filed two days late, under  
28       to the “clear and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated

1 the importance of filing the petition with the District Court within the one-year mandate,  
2 absent a showing of “good cause” for the delay in filing. Gonzales, 590 P.3d at 902. The one-  
3 year time bar is therefore strictly construed. In contrast with the short amount of time to file a  
4 notice of appeal, a prisoner has an ample full year to file a post-conviction habeas petition, so  
5 there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties  
6 with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

7 Here, The Nevada Supreme Court affirmed Defendant’s Judgment of Conviction on  
8 October 16, 2009. The remittitur issued on December 29, 2009. Accordingly, Defendant had  
9 until December 29, 2010, to file a post-conviction petition. The instant Petition was not filed  
10 until March 1, 2019, which is nearly a decade after the Remittitur was filed. Therefore, this  
11 petition must be denied absent a showing of good cause and prejudice.

12 **c. Defendant’s Third Petition is successive**

13 Defendant’s Third Petition is also procedurally barred because it is successive. Under  
14 NRS 34.810(2) “[a] second or successive petition must be dismissed if the judge or justice  
15 determines that it fails to allege new or different grounds for relief and that the prior  
16 determination was on the merits or, if new and different grounds are alleged, the judge or  
17 justice finds that the failure of the petitioner to assert those grounds in a prior petition  
18 constituted an abuse of the writ.” (emphasis added). Second or successive petitions will only  
19 be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3);  
20 Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). The Nevada Supreme Court  
21 has stated: “Without such limitations on the availability of post-conviction remedies, prisoners  
22 could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition,  
23 meritless, successive and untimely petitions clog the court system and undermine the finality  
24 of convictions.” Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court  
25 recognizes that “[u]nlike initial petitions which certainly require a careful review of the record,  
26 successive petitions may be dismissed based solely on the face of the petition.” Ford v.  
27 Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or  
28 allegation was previously available with reasonable diligence, it is an abuse of the writ to wait

1 to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of  
2 NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

3 The instant Petition is an abuse of the writ because it is Defendant's Third petition and  
4 it contains arguments that have been or could have been raised in the first two petitions. Thus,  
5 the Third Petition is dismissed as successive.

6 **d. Defendant's Third Petition is barred by laches**

7 Consideration of the equitable doctrine of laches is necessary in determining whether a  
8 petitioner has shown "manifest injustice" that would permit a modification of a sentence. Hart  
9 v. State, 116 Nev. 558, 563-64, 1 P.3d 969, 972 (2000). In Hart, the Nevada Supreme Court  
10 stated: "Application of the doctrine to an individual case may require consideration of several  
11 factors, including: (1) whether there was an inexcusable delay in seeking relief (2) whether an  
12 applied waiver has arisen from the petitioner's knowing acquiescence in existing conditions;  
13 and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court,  
14 94 Nev. 631, 633, 584 P.2d 672, 673-674 (1978).

15 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
16 exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing  
17 a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the  
18 filing of a petition challenging the validity of a judgement of conviction...". See NRS  
19 34.800(2). To invoke the presumption, the statute requires the State plead. NRS 34.800(2).

20 Here, Defendant's Judgment of Conviction was affirmed on December 29, 2009.  
21 Defendant did not file the Third Petition until March 1, 2019, nearly a decade after the  
22 Remittitur. Under NRS 34.800, Defendant's over nine-year delay in filing the instant petition  
23 creates a rebuttable presumption of prejudice to the State. Defendant failed to overcome this  
24 presumption of prejudice.

25 //

26 //

27 //

28 //

1       **II. DEFENDANT FAILED TO SHOW GOOD CAUSE TO OVERCOME THE**  
2       **PROCEDURAL BARS**

3       A showing of good cause and prejudice may overcome procedural bars including  
4       untimeliness and successiveness. NRS 34.726(1); NRS 34.810(2). To avoid procedural default  
5       under NRS 34.726 and NRS 34.810, a defendant has the burden of pleading and proving  
6       specific facts that demonstrate good cause for his failure to present his claim in earlier  
7       proceedings or to otherwise comply with the statutory requirements. See Hogan v. Warden,  
8       109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104  
9       Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “To establish good cause, appellants *must* show  
10      that an impediment external to the defense prevented their compliance with the applicable  
11      procedural rule.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added);  
12      see also Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev.  
13      at 887, 34 P.3d at 537.

14      Here, Defendant does not provide a good cause to overcome his procedural defaults.  
15      Accordingly, Defendant’s Third Petition is dismissed.

16       **III. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

17      NRS 34.770 grants this Court discretion to determine whether an evidentiary hearing  
18      is necessary:

- 19       1. The judge or justice, upon review of the return, answer and all  
20       supporting documents which are filed, shall determine whether an  
21       evidentiary hearing is required. A petitioner must not be  
22       discharged or committed to the custody of a person other than the  
23       respondent unless an evidentiary hearing is held.
- 24       2. If the judge or justice determines that the petitioner is not  
25       entitled to relief and an evidentiary hearing is not required, he shall  
26       dismiss the petition without a hearing.
- 27       3. If the judge or justice determines that an evidentiary hearing is  
28       required, he shall grant the writ and shall set a date for the hearing.

29      Importantly, the Nevada Supreme Court has ruled that if a petition can be resolved  
30      without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118  
31      Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d

1 603, 605 (1994). A defendant is only entitled to an evidentiary hearing if his petition is  
2 supported by specific factual allegations that are not belied by the record and, if true, would  
3 entitle him to relief. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Hargrove v. State, 100 Nev.  
4 498, 503, 686 P.2d 222, 225 (1984). Moreover, it is improper to hold an evidentiary hearing  
5 simply to make a complete record. State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234,  
6 112 P.3d 1070, 1076 (2005) (“The district court considered itself the ‘equivalent of . . . the  
7 trial judge’ and consequently wanted ‘to make as complete a record as possible.’ This is an  
8 incorrect basis for an evidentiary hearing”).

9        Here, existing record fully resolves issues. Defendant's claims are procedurally barred  
10      as untimely, successive, and by doctrine of laches. Accordingly, Defendant's request for an  
11      evidentiary hearing is denied.

## ORDER

13 THEREFORE, IT IS HEREBY ORDERED that Defendant Johnny McMahon's  
14 Petition for Writ of Habeas Corpus (Post-Conviction) and the Request for Evientiary  
15 Hearing are hereby DENIED.

16 DATED this 17th day of June, 2019.

Willa Kort  
DISTRICT JUDGE

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

23  
24 BY BB BERNARD ZADROWSKI  
25 Chief Deputy District Attorney  
Nevada Bar #006548

28 hjc/SVU