

No. _____

OCTOBER TERM, 2018

In the Supreme Court of the United States

CHRISTIAN WALKER, Petitioner,

v.

JERRY HOWELL, Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Megan C. Hoffman requests leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Christian Walker has been granted leave to so proceed in the district court and in the United States Court of Appeals. Counsel for Mr. Walker was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). *See also* Supreme Court Rule 39.1 (authorizing leave to proceed in forma pauperis). Accordingly, no affidavit is attached.

Dated this 20th day of June, 2018.

Respectfully submitted,

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QUESTIONS PRESENTED

1. When a client is actually innocent and the circumstantial evidence supports a finding of innocence, did the lower court's decision denying relief conflict with *House v. Bell* by instead imposing a heightened standard of review?

LIST OF PARTIES

There are no parties other than those listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Christian Walker is innocent.

He is innocent because his co-defendant, Johnny Walker (Johnny)¹, has been trying to tell a jury since 1997, Christian Walker (Christian) did not: (a) know Johnny had a gun; or (b) know Johnny intended to scare or threaten the victim; or (c) plan to scare or threaten the victim. Under Nevada law, Christian is innocent of attempt murder with use of a deadly

¹ For ease of reference, this brief will refer to Christian Walker as “Christian” and Johnny Walker as “Johnny.”

weapon. He is entitled to pass through the *Schlup v. Delo*, 513 U.S. 298 (1995) gateway to obtain review of the claims in his untimely petition.

However, the Ninth Circuit Court of Appeals Circuit affirmed the lower court's dismissal of Christian's habeas petition as untimely. Appendix B. The court concluded "even" under a *de novo* standard, the district court properly concluded Christian had not met the *Schlup* standard because Johnny's testimony lacked credibility.

As clearly stated in *House v. Bell*, "the inquiry does not turn on discrete findings regarding disputed points of fact." 547 U.S. 518, 539-40, 126 S. Ct. 2064, 2077 (2006). Johnny's credibility must be viewed in light of all the evidence, and neither of the lower courts followed this Court's directive.

Christian asks this Court hear his case because the Circuit's decision directly contradicts clearly established Supreme Court authority on actual innocence as a basis to overcome procedural hurdles to filing a federal habeas petition. Under *Schlup* the lower courts are required to "assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Schlup*, 513 U.S. at 332. Christian was denied this review.

OPINIONS BELOW

The Circuit decision of the Ninth Circuit Court of Appeals affirming the dismissal of Mr. Walker's petition for a writ of habeas corpus as untimely issued on February 5, 2018. *See* Appendix B.

JURISDICTION

The district court dismissed Mr. Walker's petition as untimely on March 30, 2016. *See* Appendix C. The court granted him a Certificate of Appealability on the issue "whether petitioner has demonstrated actual innocence to equitably toll the period of limitation." *Id.* Mr. Walker timely appealed and the Ninth Circuit affirmed the dismissal of the petition on February 5, 2018. *See* Appendix B. The court also denied Mr. Walker's timely petition for rehearing. Appendix A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. *See also* Sup. Ct. R. 13(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1) provides a 1-year period of limitation to file an application for a writ of habeas corpus.

STATEMENT OF THE CASE

I. Pretrial Proceedings

Christian and Johnny were charged with attempted murder with use of a deadly weapon and battery with use of a deadly weapon under

an aiding and abetting theory. The state alleged on September 22, 1997, Johnny shot David Dimas and Christian either aided and abetted or conspired with Johnny in the shooting. Christian did not.

Christian's attorney, John Fadgen, moved to sever the two trials. He argued he intended to call Johnny as a witness, whose testimony "would absolve [Christian] of any guilt in this case." However, if the trials were joined, Johnny would invoke his Fifth Amendment privilege against self-incrimination. Fadgen, by affidavit, indicated Johnny would testify, if called, Christian "did not know that David Dimas was going to be shot." Johnny's attorney joined the motion.

The state opposed the motion. In response, Fadgen argued "Johnny would testify at Christian[s] trial that Christian [] did not know and was not aware that David Dimas would be shot." Johnny's attorney corroborated Johnny's wish to testify and, while not conceding guilt on the offense as charged, "there is a reasonable likelihood that if he were to testify [the] likelihood of Christian [] being convicted of any of the charges would be substantially reduced." The motion to sever was granted.

///

II. Johnny's trial

Johnny was tried first. The state served Fadgen with a subpoena. Fadgen, stated, under oath, Johnny was going to testify Christian knew nothing about the fact Johnny intended to shoot Dimas. The state indicated those facts to the judge. The subpoena was quashed.

Johnny was convicted by a jury of battery with use of a deadly weapon.

III. Christian's trial

Christian's trial followed. Fadgen issued a material witness subpoena for Johnny Walker. However, Fadgen never called Johnny to testify at Christian's trial. The state's theory in its case-in-chief was Christian conspired with Johnny to shoot Dimas, whom Christian believed had stolen his chain earlier in the day. Johnny provided the weapon and ultimately shot Dimas. However, the state argued, Johnny shot Dimas at Christian's request. Christian was convicted by a jury of attempt murder with use of a deadly weapon.

IV. Johnny's affidavit

In 2002, Johnny signed an affidavit in which he avowed he contacted Fadgen by letter in October 1997. He claimed the content of the letter was to inform Fadgen that Christian did not know Johnny had

a gun that day and that Christian did not have any intent to shoot Dimas. Appendix F.

V. Post-trial proceedings

Christian timely appealed his conviction and sentence with Fadgen continuing his representation on appeal. The Nevada Supreme Court affirmed the conviction and dismissed the appeal on June 21, 1999. Remittitur issued on July 19, 1999.

Christian's AEDPA time began to run on September 20, 1999, or ninety days after issuance of the Nevada Supreme Court's order of affirmance. 28 U.S.C. § 2244(d)(1)(A). His AEDPA time expired on or about September 19, 2000.

Although the remittitur issued in July of 1999, in 2000, Fadgen informed Christian his direct appeal was still pending. EOR 111. On March 9, 2001, Fadgen passed away. Nearly two years after appointment, new counsel filed an untimely state habeas petition on Christian's behalf on July 14, 2003. The Nevada Supreme Court affirmed the dismissal of the untimely petition.

Christian mailed his proper person 2254 habeas petition to the federal district court on or about June 29, 2004. Appendix F. His two

requests to appoint counsel were denied, and the district court granted the state's motion to dismiss the petition as untimely. Appendix G, D. The court concluded Christian's evidence of actual innocence was "not trustworthy." Appendix D.

The Ninth Circuit reversed the dismissal of the petition as untimely and ordered the district court to hold an evidentiary hearing. Appendix E.

VI. Evidentiary Hearing

Following the Ninth Circuit's remand for an evidentiary hearing, Christian's case remained pending in the district court docket until December 27, 2013, following a renewed motion for a status conference. ECF Nos. 46, 48, 49. The evidentiary hearing was held on July 9, 2014. EOR 1395.

A. Johnny Walker

Johnny Walker testified, on the night of September 22, 1997, Johnny shot David Dimas. EOR 1404. Johnny was carrying a gun that night—a .22 semi-automatic pistol. EOR 1406. He often carried a gun but never told anyone. *Id.* That night, as he typically did, he was carrying and did not tell Christian. Overall, Johnny said He and Christian "never"

made a plan to shoot Dimas. EOR 1414. Johnny never communicated to Christian about his plan to scare Dimas. *Id.* Johnny was “[w]ithout a doubt” the only person responsible for shooting Dimas. EOR 1415.

Before Johnny was arrested, he told Christian’s father, Gerald, he shot Dimas. EOR 1411-2. Johnny never denied committing the crime. In the presentence report and at sentencing he stated he did not intend to shoot Dimas. Therefore, the conviction of battery did not “fit [] what really happened.” EOR 1474; 1478.

Johnny wrote a letter to Christian’s attorney, Fadgen, after the arrest, about two weeks after the shooting. EOR 1412-3; 1440. Johnny stated, in the letter, he wanted to take full responsibility for what he did. Christian had nothing to do with the shooting. He was willing to testify at Christian’s trial. EOR 1412-3; 1443. Johnny wrote the letter out when he was in a cell on the ninth floor of the Clark County Detention Center and then gave it to Christian to give to Fadgen. EOR 1413; 1438-9; 1448; 1450.

B. Gerald Walker

Gerald Walker is Christian’s father and Johnny’s uncle. EOR 1524-6. Before Johnny and Christian had been arrested for the David Dimas

incident, Gerald had a conversation with Johnny about what happened. EOR 1528-34. Johnny said he shot Dimas, but it was an accident. EOR 1534. Johnny said he pulled out the gun to scare Dimas. *Id.* Christian knew nothing about Johnny's plan. *Id.*

C. Ken Lake

Ken Lake testified he was employed at Southern Desert Correctional Center as a prison law clerk. EOR 1485. While speaking with Lake, Johnny admitted he was the shooter: "what he told me is that he did it. You know, he was the one who – who more or less was guilty of the crime." EOR 1489. Lake inquired whether Johnny had told anyone. Johnny responded "he had been trying to tell people from day one and nobody listened." *Id.* Johnny continued to state that he, and he alone, planned the altercation with Dimas. Lake therefore decided it was important to obtain a signed affidavit from Johnny. *Id.*

D. Elissa Luzaich

Elissa Luzaich testified she has been employed with the Clark County District Attorney's Office for twenty years. EOR 1497. She was the prosecutor who tried Christian and Johnny in the Dimas shooting case in the fall of 1998. EOR 1498-9.

Luzaich recalled Fadgen moved to sever the trials, based on “information and belief” that “Johnny Walker would take the stand and would say that he did it, and that Chris had no knowledge of anything.” EOR 1500; see also EOR 217-324; 327. She acknowledged she and Fadgen discussed Johnny’s testimony, either right before, or during Christian’s trial, but she had no independent recollection about what was said. EOR 1511.

E. The district court's order

The district court issued its order dismissing Christian's petition as untimely on March 30, 2016. Appendix C. Much of the court's 2016 order mirrored its previous dismissal of Walker's petition. Compare Appendix C with Appendix D. Specifically, the court doubted whether Johnny had ever prepared a letter or affidavit to provide to Fadgen before Christian's trial, despite ample evidence to the contrary. The court also discounted portions of Johnny's evidentiary hearing testimony and all of Gerald Walker's testimony.

REASONS FOR GRANTING THE PETITION

The district court concluded Christian did not prove his innocence because Johnny’s testimony was not credible. The Circuit decision agrees. However, the adverse credibility findings are not supported by

the record where the courts overlooked evidence which tended to prove the reliability of Johnny's testimony and which bolstered his credibility.

More importantly, the evidence presented at the evidentiary hearing proves "it is more likely than not that no reasonable juror would have found [Christian] guilty [of attempt murder with use of a deadly weapon] beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995). Johnny's testimony at the evidentiary hearing established Christian's actual innocence. Johnny testified it was his plan, and his plan alone, to use the gun to scare the victim, David Dimas. Under Nevada law, Christian is innocent and he is entitled to have the claims in his federal habeas petition heard on the merits.

The district court and the Circuit did not discharge their obligations under clearly established Supreme Court law, which required the courts to consider whether a reasonable juror—upon consideration of all the available evidence—would have found Christian guilty beyond a reasonable doubt.

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A. The Circuit decision conflicts with clearly established, controlling authority from this Court on actual innocence gateway claims to overcome procedural defaults and timeliness challenges.

The Circuit's decision conflicts with clearly established, controlling Supreme Court precedent. The Circuit decision also disregards this Court's clear directive that courts should consider all of the available evidence in actual innocence cases and apply the "predictive standard regarding whether reasonable jurors would have reasonable doubt." *House v. Bell*, 547 U.S. 518 at 539-40 (2006). Here, the Circuit's decision accords unwarranted deference to the district court's adverse credibility findings with regard to Johnny's testimony.² It also fails to review and analyze all of the available evidence.

1. The Circuit's decision conflicts with *House v. Bell*.

The Circuit's decision is, in the first instance, contradictory. While the Circuit states it proceeds "under the more rigorous *de novo* standard" of review in analyzing Christian's evidence of actual innocence, in reality

² The Circuit decision makes no reference to the testimony of Ken Lake, for which there is no adverse credibility finding by the district court. Nor does the decision make any reference to Gerald Walker's (Christian's father) testimony, for which the district court also made an adverse credibility finding not supported by the record. Docket 43.

the decision relies exclusively upon the district court’s adverse credibility finding of Johnny’s testimony. Compare Appendix B with C. The decision accords undue deference to the district court’s credibility findings and conflicts with clearly established Supreme Court precedent on the appropriate process a reviewing court is to undertake in an actual innocence inquiry.

“To be credible, [a claim of actual innocence] must be based on reliable evidence not presented at trial.” *Calderon v. Thompson*, 523 U.S. 538 (9th Cir. 1998) (citing *Schlup*, 513 U.S. at 324). In considering the reliability of new evidence for an actual innocence gateway claim, lower courts “may consider [] the timing of the submission and the likely credibility of the affiants”. *Schlup*, 513 U.S. at 332; *see also McQuiggin v. Perkins*, 569 U.S. 383, 386-7, 399 (2013).

However, the lower court’s assessment of the “likely credibility of the affiants” is not bullet-proof. In later cases, this Court reminded reviewing courts that while some deference to the lower court’s credibility finding is appropriate, “the *Schlup* inquiry, we repeat, requires a holistic judgment about *all the evidence*, and its *likely effect on reasonable jurors* applying the reasonable doubt standard.” *House*, 547 U.S. at 539-40

(emphasis added). The Court admonished lower courts from focusing on “discrete findings regarding disputed points of fact” and reiterated it “is not the [lower] court’s independent judgment as to whether reasonable doubt exists”. *Id.* Rather, the Court must make a “probabilistic determination about what reasonable, properly instructed jurors would do.” *Id.* at 538.³

The *House* opinion presents a very similar situation to the one presented here. In *House*, the Court held in the case before it, although the lower court “managed complex proceedings, carefully reviewed the extensive record, and drew certain conclusions about the evidence,” the lower court improperly substituted its independent judgment as to the existence of reasonable doubt rather than considering the likely effect of the new evidence on a reasonable juror. *Id.* Also, upon a *de novo* review of the evidence, the Supreme Court ruled the lower court’s conclusions—

³ Indeed, whether Christian’s jury was properly instructed is the crux of this case. Christian’s jury was not properly instructed on the intent required for aiding and abetting or acting as a co-conspirator liability under Nevada law. *See Sharma v. State*, 56 P.3d 868 (Nev. 2002); *Bolden v. State*, 124 P.3d 191 (Nev. 2005) (overruled on other grounds by *Cortinas v. State*, 195 P.3d 315 (Nev. 2008)). Johnny’s statements and testimony undermine the very essence of the state’s burden to prove Christian had the requisite *mens rea*. EOR 39-46; 47-115.

including its adverse credibility determinations of certain witnesses—were unfounded. *Id.* at 551-3. The Court deferred to the lower court’s credibility finding only when it was based on the witness’ “demeanor.” *Compare id.* at 551-3 (rejecting adverse credibility findings for witnesses Parker and Letner where not based on demeanor) and 553 (accepting adverse credibility finding based on House’s demeanor).

In Christian’s case, the district court and Circuit court failed to make a predictive, “holistic judgment about *all the evidence*, and its *likely effect on reasonable jurors* applying the reasonable doubt standard.” *House*, 547 U.S. at 539-40 (emphasis added); Appendix C. Likewise, the Circuit decision affords undue deference to the district court’s credibility and reliability determinations under the guise of *de novo* review. The Circuit does not identify any issues with Johnny’s testimony other than those relied upon by the district court. Appendix B.

Here, the district court did not conclude Johnny’s demeanor rendered his testimony incredible. Rather, the court focused solely on “discrete findings of disputed points of fact” and improperly substituted its own judgment as to whether it believed Christian is innocent. The

Circuit decision relied exclusively on the findings of the district court. Yet the question here is not whether the district court or the Circuit believed Johnny's evidentiary hearing testimony. The inquiry is whether a reasonable juror, knowing everything she knows about all of the available evidence—including impeachment evidence of Johnny—would find Christian not guilty beyond a reasonable doubt. And neither court engaged in this required inquiry.

2. The Circuit's decision fails to review all the available evidence that indicates Christian is innocent.

The Circuit opinion relies on the following reasons for its denial of Christian's appeal: (a) Johnny's testimony lacked credibility; (b) there were factual inconsistencies with the timeline; (c) Johnny asserted his innocence after making his affidavit; and (d) Johnny had prior convictions for violent felonies. Appendix B. These were the same reasons employed by the district court in its order. Appendix C. The courts' assertions are not supported by the record.

a. Johnny's testimony was credible because the district court ignored the facts offering the strongest indicia of reliability.

The district court concluded the letter or affidavit Johnny wrote in 1997 never existed. Appendix C. The district court's conclusion simply

ignores evidence in the record that everyone—including courts and state actors—have accepted as true. This evidence has strong bearing on the reliability of Johnny’s 2002 affidavit and his evidentiary hearing testimony.

b. Earlier Affidavit/Statement

Johnny provided exculpatory evidence for Christian in 1997 or 1998, be it by letter, affidavit, or oral statement.

The evidence of this exculpatory evidence can be found in publicly-filed court documents from 1998—evidence which the district court not only discounted but ignored completely—in which attorneys for both Christian and Johnny, and attorneys for the State of Nevada, acknowledge the existence of such evidence. EOR 217, 230, 232, 242, 300-1, 326, 383-4, 658. Johnny’s attorney advised the trial court that Johnny intended to testify. EOR 300. And if Johnny testified, he would not concede guilt to “the exact offense as charged in the case at bar,” but his testimony would “necessarily limit the culpability” of Christian and “there is a likelihood that if [Johnny] were to testify that likelihood of Christian Walker being convicted *of any* of the charges would be substantially reduced. [sic]” EOR 300-1 (emphasis added).

A previous panel of the Circuit Court already acknowledged that the “circumstances surrounding the submission of Johnny Walker’s affidavit are consistent with its trustworthiness. This is unlike the typical case in which a petitioner claiming actual innocence presents suspiciously late affidavits—such as affidavits from non-eyewitnesses who are in prison or were acquitted—that a court could deem inherently untrustworthy.” *Walker*, 2012 WL 5350848, at *2, Docket 67; Appendix E. Instead, this case presents a timely and *sua sponte* inculpatory admission by Johnny in 1997 or 1998.

The lower courts ignored the very facts that have the greatest bearing on the reliability of Johnny’s testimony and his multiple prior statements. Johnny has been telling the same version of events since at least 1997, *before* he was tried and convicted in his case. The circumstances surrounding Johnny’s statements and testimony lend them an indicia of reliability not present in most actual innocence cases. *House*, 547 U.S. at 551-3; *McQuiggin*, 569 U.S. at 386-7, 399.

c. 2002 Affidavit and Johnny’s evidentiary hearing testimony

The content of Johnny’s 2002 affidavit was consistent with the statements Johnny provided in 1997 or 1998. Compare EOR 217, 230,

232, 242, 300-1, 384, 383 with EOR 1552-3. The affidavit was also consistent with his evidentiary hearing testimony in 2014. *See* EOR 1404-14. Also, Ken Lake—the inmate who assisted Christian in preparing his habeas petition and who obtained the 2002 affidavit from Johnny—testified that Johnny immediately admitted his sole involvement in the shooting. EOR 1552-3. The district court does not discuss Ken Lake’s testimony in any way other than to attribute the wrong affidavit to him. EOR 6.⁴

Johnny’s 2002 affidavit and his evidentiary hearing testimony was consistent with Gerald’s testimony concerning his conversation with Johnny shortly after the shooting but before Johnny’s arrest. EOR 1404-14.

Likewise, the content of Johnny’s affidavit and his evidentiary hearing testimony was consistent with the evidence presented at trial. Indeed, the district court had to concede as much. EOR 9. Both Johnny’s testimony at the evidentiary hearing and the trial testimony of the

⁴ The district court made a factual error in its order when it attributed the 1997 or 1998 affidavit to Ken Lake, rather than the 2002 affidavit. EOR 6.

victim, David Dimas, were consistent as to the how the shooting occurred. Compare EOR 1409-10 with EOR 719, 783-4, 793.

d. There were no factual inconsistencies with the timeline.

The Circuit's order alleges Christian's timeline contained factual inconsistencies, yet it provides no details on what is inconsistent. Appendix B. Christian, therefore, can only hypothesize that the Circuit adopted the district court's findings that (a) Johnny listed an incorrect address on his 1997 jail intake forms, and (b) "Johnny gradually forgot that the journey to Tawsha's residence was why he was at Dimas's house." Appendix C. The courts' conclusions do not themselves withstand scrutiny.

As to the incorrect address, Johnny testified he did not have a stable home and essentially couch-surfed after moving out of Christian's parents's home. EOR 1401-2. He testified he lived with friends, in "independent living" houses, in "group homes", with his father, with a lady, and with a friend named "Oscar" during the time between moving out and the shooting. *Id.* On his jail intake form, he listed a woman's address as his residence. That statement is not inconsistent with his testimony, where he indicated as living with a "friend and a lady friend"

and/or his friend Oscar. EOR 1401-2, 1416-7. Johnny's transience explains his inability to remember his exact address nearly 20 years later at the evidentiary hearing.

Further, the court's finding as to Johnny's "gradually forget[ting] that the visit to Tawsha's residence was why he was at Dimas's house" is not supported by the record. The district court cites page 68 of the hearing transcript (EOR 1462) in support of its conclusion. Appendix C. However, the transcript simply does not reflect the court's assertion. Johnny did not forget they were going to Tawsha's. The entire exchange on this issue reads:

Q: And Chris was cool with this; right? "Let's go across the street. Smoke weed."

A: Yeah.

Q: Because you are not going to Tosha and Angel's house; right?

A: *No audible response.*

Q: Chris was the one that needed to go to Tosha and Angel's house. He received the page; correct?

A: I mean, Chris – Chris likes smoking weed, too, like Brandon and David. I mean, he – he's going over there to smoke weed, yeah. I mean we could have toked up and then went to Tosha's house. I don't know what he was thinking when –

Q: All right.

A: – when we – I don't know. You got to ask him.

EOR 1462. Johnny admitted Christian was in agreement to go across the street to smoke weed after they arrived at Dimas's house. Johnny also testified that Christian may have still wanted to go to Tawsha's house afterward; he could not speak to what was in Christian's mind. EOR 1462. But Johnny did not "forget" that they were originally headed to Tawsha's before they ran into Dimas. The court's and the Circuit's conclusion otherwise is not supported by the transcript.

In either event, the courts' conclusions as to the timeline present a perfect example of the lower courts improperly focusing solely on "discrete findings of disputed points of fact". *House*, 547 U.S. at 539-40; see also *supra*.

1. Johnny did not assert his innocence to the shooting after making his affidavit.

The district court and the Circuit concluded Johnny's testimony was not reliable because he asserted his innocence to the shooting after making his affidavit. This fact is simply erroneous.

Johnny did not assert his innocence after he signed the 2002 affidavit. Between 1997 and approximately 2000, Johnny did, however,

present a defense at his trial, claimed he did not commit the charged crime in his presentence statement, and he filed an appeal.

Johnny's own lawyers advised the trial court that Johnny would not concede guilt to "the exact offense as charged in the case at bar," but his testimony would "necessarily limit the culpability" of Christian. EOR 300-01. Even Johnny's lawyers, therefore, acknowledged Johnny was not proclaiming innocence to any possible crime or the shooting. His statement in the presentence report did just that: denied culpability for an event Johnny believed to be an accident. Compare EOR 1592 (citing PSI filed under seal in district court) with EOR 1411, 1414, 1478-9 (hearing testimony on accident). *See also Nev.Rev.Stat. 194.010* (setting forth lack of liability if act committed as an accident).

Johnny also had a constitutional right to present a defense at his own trial, even if he was also willing to testify in Christian's favor. *Irvin v. Dowd*, 366 U.S. 717, 721-2 (1961). Moreover, trial strategy is the province of the attorney and not the defendant. ABA Standards for Criminal Justice, Defense Function, Std. 4-5.2(b) (4th ed. 2015); *Jones v. Barnes*, 463 U.S. 745 (1983).

Finally, it was the decision of Johnny's attorneys, and not Johnny, to file an appeal. EOR 1413, 1474-5. Johnny did not file any post-conviction petitions challenging his sentence. EOR 1413-4.

2. Johnny's prior convictions do not render his testimony less credible in this case.

The Circuit rejected Johnny's testimony because of his prior "violent" felony convictions. Appendix B. Johnny's prior convictions do not render his testimony less credible under the circumstances of this case.

Johnny had one prior felony conviction for attempt burglary (a non-violent felony) before his arrest in this attempt murder case. EOR 1403-4. By the time of the evidentiary hearing, he also had felony convictions for battery with use of a deadly weapon (conviction in this case), battery by prisoner, and a first degree murder conviction in an unrelated case. Johnny did not have any violent felony convictions before his statements or affidavit in 1997. Moreover, although Johnny's prior convictions may be used to impeach his credibility, in this case there is overwhelming evidence to support the veracity of Johnny's version of events. In other words, none of Johnny's prior convictions can undo the fact that his

testimony and statements in this case have been consistent since 1997, before Johnny was convicted of any violent felonies.

CONCLUSION

For the reasons stated above, Christian Walker respectfully requests that this Court grant his petition for a writ of certiorari.

Dated this 20th day of June, 2018.

Respectfully submitted,

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APP. 001

FILED

UNITED STATES COURT OF APPEALS

MAR 22 2018

FOR THE NINTH CIRCUIT

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

CHRISTIAN WALKER,

Petitioner-Appellant,

v.

E. K. MCDANIEL,

Respondent-Appellee.

No. 16-15611

D.C. No.

2:04-cv-00929-KJD-PAL

District of Nevada,

Las Vegas

ORDER

Before: THOMAS, Chief Judge, and RAWLINSON and WATFORD, Circuit Judges.

The panel voted to deny the Petition for Rehearing and to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc, and no judge of the court has requested a vote.

The Petition for Rehearing filed on February 20, 2018, is DENIED, and the Suggestion for Rehearing En Banc is REJECTED.

APP. 002

FILED

NOT FOR PUBLICATION

FEB 05 2018

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

CHRISTIAN WALKER,

No. 16-15611

Petitioner-Appellant,

D.C. No.

v.

2:04-cv-00929-KJD-PAL

E. K. MCDANIEL,

MEMORANDUM*

Respondent-Appellee.

*

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Argued and Submitted January 10, 2018
San Francisco, California

Before: THOMAS, Chief Judge, and RAWLINSON and WATFORD, Circuit
Judges.

In 1998, Christian Walker (Walker) was convicted of attempted murder arising from a dispute involving Walker and his cousin, Johnny Walker (JW). At his trial, JW produced evidence that Walker was the shooter. JW was acquitted of attempted murder, but convicted of battery. At his sentencing hearing, JW maintained his innocence.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

APP. 003

At his trial, Walker argued that JW was the shooter. Following his conviction, Walker's appeal to the Nevada Supreme Court was dismissed. Walker subsequently petitioned for habeas relief in Nevada state court. The petition was ultimately unfruitful.

In 2002, JW had signed an affidavit describing a letter sent to Walker's trial counsel before Walker's trial, confessing that he was the shooter, and that Walker had no prior knowledge of the attack. Walker thereafter filed a federal petition for habeas relief, asserting primarily ineffective assistance of counsel, but attaching JW's affidavit. The federal district court dismissed Walker's petition as untimely.

On appeal, we affirmed the district court's denial of equitable tolling based on attorney misconduct, but vacated and remanded the district court's denial of tolling based on actual innocence. We determined that JW's affidavit was sufficiently trustworthy to warrant an evidentiary hearing.

At the evidentiary hearing, JW testified about the night of the shooting, the letter to Walker's attorney, his remorse for the shooting, and his acceptance of responsibility for the shooting. The prosecuting attorney in Walker's trial also testified regarding the trial tactics in the case.

Following the evidentiary hearing, the district court again dismissed Walker's petition as untimely, finding that Walker failed to adequately raise a claim of actual innocence to warrant equitable tolling. This appeal followed.

APP. 004

To succeed on an actual innocence claim, the petitioner must present new evidence that “persuades the district court that . . . no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Stewart v. Cate*, 757 F.3d 929, 938–39 (9th Cir. 2014), *as amended*; *see also Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Even under the more rigorous *de novo* standard, Walker’s claim of actual innocence is unavailing. The district court evaluated JW’s testimony and determined that the testimony lacked credibility. In addition, there were factual inconsistencies in the timeline of events, contradictory assertions of innocence made by JW after the affidavit, and JW’s prior convictions for violent felonies. Because Walker failed to establish a valid *Schlup* claim, the district court properly dismissed Walker’s habeas petition as untimely. *See Copeland v. Ryan*, 852 F.3d 900, 903, n.1 (9th Cir. 2017); *see also Cate*, 757 F.3d at 938.

AFFIRMED.

APP. 005

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

APP. 006

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) **Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) **Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) **Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

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- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

APP. 008

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			\$	\$			\$	\$
Opening Brief			\$	\$			\$	\$
Answering Brief			\$	\$			\$	\$
Reply Brief			\$	\$			\$	\$
Other**			\$	\$			\$	\$
TOTAL:				\$	TOTAL: \$			

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

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I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By:

, Deputy Clerk

APP. 010

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA

CHRISTIAN D. WALKER,

Petitioner,

vs.

JACKIE CRAWFORD, et al.,

Respondents.

Case No. 2:04-cv-00929-KJD-PAL

ORDER

Per the directions of the court of appeals, this court has held an evidentiary hearing on whether petitioner can demonstrate actual innocence to excuse the untimeliness of this action. Actual innocence can excuse operation of the statute of limitations. McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013). “[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” Id. (quoting Schlup v. Delo, 515 U.S. 298, 329 (1995)). The court finds that petitioner has not demonstrated actual innocence, and the court dismisses this action.

At trial, the following evidence was produced. At J.M. Ullom Elementary School in Las Vegas, petitioner was showing off his gold necklace to David Dimas, Lionel Hernandez, Mysty Fuller, and Maureen McConaha. They also were smoking marijuana. Petitioner then left with Fuller and McConaha but unknowingly without his necklace, and Dimas and Hernandez went to

APP. 011

1 their homes. Ex. 58, at 43-46 (#58).¹ Some time later, petitioner arrived at Dimas' house, asking
2 where his necklace was. Dimas denied that he possessed the necklace. Petitioner stated that he
3 "ain't going out like no punk," and he left. Id. at 46-50 (#58). Even later, petitioner arrived at
4 Dimas' house with his mother, Annette Walker, and again demanded the necklace. Dimas
5 continued to deny that he possessed the necklace. Petitioner's mother threatened a small-claims
6 action, and the two left. Id. at 51-52 (#58). Finally, around 11:00 p.m., Dimas was outside smoking
7 before bed, and his friend Brandon Douzat was with him. Petitioner and his cousin Johnny Walker,
8 who was unknown to Dimas and Douzat, walked up to them. Petitioner told Dimas that he did not
9 believe that Dimas possessed the necklace. Either petitioner or Johnny² suggested that they go
10 across the street to Ullom Elementary to smoke marijuana. They went across the street, and
11 everybody but Johnny smoked marijuana. At the end, everybody started shaking hands. When
12 Dimas offered to shake Johnny's hand, Johnny grabbed Dimas' right arm with his left hand. Johnny
13 then drew a small-caliber handgun with his right hand and pointed it at Dimas. Dimas ducked,
14 Johnny fired, and the bullet passed through Dimas' neck without causing a life-threatening injury.
15 Dimas and Douzat ran away. Both of them heard two more shots. Id. at 58-67 (#58); Ex. 59 at 89-
16 94 (#59).

17 At the evidentiary hearing, Johnny took the blame. He said that he was speaking with
18 petitioner at the group home run by Annette, at 4835 Terra Linda Avenue, about the loss of
19 petitioner's necklace. Then petitioner's pager received a signal. Petitioner went inside to make a
20 phone call. Petitioner then invited Johnny to walk to the home of his some-time girlfriend Tawsha
21 Orillo³ because her sister Angel also would be there. On the way, they passed Dimas' house and
22 encountered Dimas and Douzat outside. Transcript, at 11-12 (#74). Petitioner told Dimas that he
23

24 ¹The parties filed a joint list of exhibits admitted into evidence (#65), but the exhibits have not been filed
25 electronically in that form. For ease of reference, the court will refer to the exhibits by their location in the court's
26 electronic filing system.

27 ²Other than petitioner, the court will refer to people with the surname of Walker by their given names.

28 ³Her name is spelled "Tosha" in the evidentiary hearing transcript. The parties stipulated that Tawsha Orillo
died in 2008.

APP. 012

1 did not think that Dimas had stolen petitioner's necklace. Id. at 13 (#74). Johnny then thought that
2 if Dimas did not possess the necklace, then at least he would know who did. Johnny was carrying a
3 concealed handgun, and he decided to threaten Dimas into telling who had the necklace.⁴ Id. at 13-
4 14 (#74). Johnny suggested that they all go across the street to the elementary school and smoke
5 marijuana. They agreed. At the end, when people started shaking hands, Johnny, being left-handed
6 grabbed Dimas' right hand with his own right hand, drew his gun with his left hand, and pointed the
7 gun at Dimas' head. Dimas jerked, and Johnny unintentionally fired the gun. Dimas and Douzat
8 ran away, and petitioner was shocked. Johnny told petitioner that they needed to leave. Id. at 16-17
9 (#74). Johnny insisted that petitioner did not know what Johnny intended to do. Id. at 17.

10 Johnny testified that he related his story to three people. First, he testified that he told the
11 above story to Gerald Walker, petitioner's father, before he was arrested. Transcript, at 17-18 (#74).
12 Second, he testified that on the day that they were arrested, he gave petitioner a letter or affidavit
13 offering to testify to the above story. Id. at 19 (#74). Third, he testified that in 2002 he wrote an
14 affidavit with the assistance of a fellow inmate named Ken Lake in which he stated that he had
15 mailed to petitioner's counsel, John Fadgen, an affidavit describing the above story. Id. at 46-48
16 (#74).

17 Less than two weeks after Johnny shot Dimas, petitioner and Johnny shot Maureen
18 McConaha to death. The police investigation of McConaha's death led them to petitioner's and
19 Johnny's involvement in the shooting of Dimas.

20 Petitioner and Johnny originally were to be tried jointly. Fadgen, petitioner's counsel,
21 moved to sever the trial. He argued that the defenses would be antagonistic and, relevant to the
22 issue at hand, he argued that if Johnny was tried separately then he would testify in petitioner's
23 defense. Ex. 17 (#56). Johnny joined in the motion, and the state district court granted it.

24 Johnny was tried first. His first trial ended in a mistrial. His second trial ended with him
25 found not guilty of attempted murder with the use of a deadly weapon and convicted of battery with
26 the use of a deadly weapon. Ex. 66 (#59)

27
28 ⁴At that time, Johnny had been convicted of at least one felony, and he was on probation.

APP. 013

1 After Johnny's second trial, Fadgen filed an ex parte motion asking that Johnny be made
2 available to testify at petitioner's trial. Ex. 52 (#58). The state district court granted the motion in
3 an ex parte order. Ex. 56 (#58).

4 Petitioner then was tried. Johnny did not testify at petitioner's trial. Petitioner was
5 convicted of attempted murder with the use of a deadly weapon. Ex. 85 (#60).

6 Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 87 (#60). For the
7 purposes of 28 U.S.C. § 2244(d)(1)(A), the judgment of conviction became final on September 20,
8 1999.

9 Petitioner filed his first post-conviction habeas corpus petition in state district court on July
10 14, 2003. Ex. 93 (#60). The state courts determined that it was untimely under Nev. Rev. Stat.
11 § 34.726(1). Ex. 108 (#60). The Nevada Supreme Court issued its remittitur on March 30, 2004.
12 Ex. 109 (#60).

13 This court received petitioner's original, proper person habeas corpus petition on July 2,
14 2004. The court determined that the action was untimely. Even giving petitioner the benefit of the
15 doubt and assuming that petitioner did not learn about the conclusion of his direct appeal until
16 August 13, 2001, after Fadgen had died and after petitioner had asked his counsel in the McConaha
17 murder case to look into the Dimas shooting case, the one-year period of 28 U.S.C. § 2244(d)(1)
18 expired eleven months before petitioner filed his state habeas corpus petition. The court found that
19 petitioner was not entitled to equitable tolling because his post-conviction counsel failed to take
20 § 2244(d) into account in deciding when to file the state habeas corpus petition. That part of the
21 court's decision has been affirmed. The court also found that Johnny's 2002 affidavit did not
22 demonstrate petitioner's actual innocence. That part of the court's decision was reversed and
23 remanded for an evidentiary hearing.

24 Petitioner filed a second state habeas corpus petition on November 7, 2007. Ex. 110 (#60).
25 Ultimately, the Nevada Supreme Court ruled that the petition was untimely, successive, and abusive
26 of the writ. Ex. 168 (#61). The second state habeas corpus petition does not affect the timeliness of
27 this action.
28

APP. 014

1 The court first discounts Gerald's testimony. Both Johnny and Gerald testified that Johnny
2 had told Gerald in 1997, before Johnny's arrest, that the shooting of Dimas was not intended, that
3 Johnny intended only to scare Dimas into revealing who possessed petitioner's necklace, and that
4 petitioner had no knowledge of Johnny's intention. This purported statement in 1997 is important
5 because it is a prior consistent statement that would have been admissible when it could have
6 affected Johnny's penal interests.

7 On cross-examination, Gerald stated that the evidentiary hearing in 2014 is the first time he
8 has testified to Johnny's statement in any court. Transcript, at 143 (#74). Gerald also stated that the
9 first people to whom he spoke about Johnny's statement were petitioner's current attorneys. Id.
10 (#74). He did not even speak about Johnny's statement to the detectives who interviewed him about
11 the McConaha murder. Id. (#74). This would have been helpful because, perhaps unbeknownst to
12 Gerald, the same detectives were assigned to both cases. This court appointed the Federal Public
13 Defender to represent petitioner on May 22, 2009. Even if petitioner's counsel contacted Gerald
14 that same day—an unlikely possibility given that counsel would need to investigate the case
15 first—that was ten and a half years after petitioner's trial. The evidentiary hearing in this court in
16 July 2014 was almost sixteen years after petitioner's trial. The court simply does not believe that
17 Gerald would have kept quiet for this long a time and let his son sit in prison for a crime that his son
18 did not commit.⁵ Instead, the court believes that Johnny never did tell Gerald what had happened in
19 1997, and that both Johnny and Gerald were not telling the truth in their testimonies in the 2014
20 evidentiary hearing.

21 This leaves the purported 1997 letter or affidavit to Fadgen as the only possible statement
22 that Johnny made before his trials in the Dimas shooting. Petitioner has not produced a copy of this
23 letter. Counsel stated at the evidentiary hearing that Fadgen's file of petitioner's case was destroyed
24 after Fadgen's death. The three stories behind this document all are different. In his 2002 affidavit,
25

26
27 ⁵Petitioner also has a sentence of life imprisonment with eligibility for parole after 10 years for the murder of
28 Maureen McConaha, plus an equal and consecutive sentence because he used a deadly weapon. However, that sentence
runs consecutively to the sentence for the Dimas shooting. If petitioner could gain relief from his sentence in the Dimas
shooting, that time would be credited to the sentences for the McConaha murder.

APP. 015

1 Johnny stated that he wrote a letter to Fadgen, taking all the blame for himself, and that Fadgen
2 never responded. Amended petition, at 68-69 (#8).⁶ Ken Lake, the inmate law clerk, testified that
3 he helped Johnny with typing out that affidavit. In his 2014 evidentiary hearing testimony, Johnny
4 testified that on the night that police arrested him and petitioner, he and petitioner were housed near
5 to each other on the 9th floor of the jail. He further testified that he wrote an affidavit offering to
6 testify in petitioner's defense and gave it to petitioner for petitioner to give to his own lawyer.
7 Transcript, at 19 (#74). Although petitioner did not testify at the evidentiary hearing, he never has
8 stated that he received this 1997 letter or affidavit from Johnny. Instead, petitioner stated in his own
9 affidavit that he saw the 1997 letter or affidavit in Fadgen's case file, and that he knew that Johnny
10 had mailed it to Fadgen. Amended petition, at 65-66 (#8). Petitioner and Johnny have contradicted
11 each other, and Johnny has contradicted himself. Johnny's testimony does not give the court
12 confidence that this 1997 letter or affidavit actually existed.

13 Finally, Johnny's own statements after the jury found him guilty lead the court not to believe
14 that this 1997 letter or affidavit existed. When it mattered to Johnny, Johnny maintained his
15 complete innocence. After the verdict, Johnny wrote a statement for the pre-sentence investigation
16 report. He stated with emphasis that he did not commit the crime. At the sentencing hearing, when
17 the judge asked him about his statement in the report, Johnny confirmed that he did write the
18 statement, and he stated further that he went to trial because he did not commit the crime. Ex. 50, at
19 9 (#58). When the judge started explaining his reasoning behind the sentence he was about to
20 impose, Johnny interrupted and stated that he did not commit the crime. *Id.* at 15 (#58). Then
21 Johnny appealed, and the appeal was pending while petitioner was tried.

22 Johnny and petitioner have tried to explain his earlier statements by arguing that he was
23 over-charged with attempted murder. The court agrees with respondents' comment in footnote 3 at
24 page 6 of their answering brief. If Johnny was willing to recognize then, as he claims to do now,
25 that he grabbed Dimas intentionally and shot him, even unintentionally, then he would have
26
27

28 ⁶The page numbers in citations to the amended petition (#8) are those created by the electronic filing system.

APP. 016

1 admitted that he had committed the general-intent crime of battery with a deadly weapon. It would
2 have been the basis for plea negotiations, and then Johnny could have testified in petitioner's trial.

3 Nonetheless, Fadgen seemed to have some reason to think that Johnny might testify
4 favorably for petitioner. Fadgen moved to sever the trials of petitioner and Johnny. He argued in
5 part, based on information and belief, that Johnny would testify on petitioner's behalf if the trials
6 were severed.⁷ After Johnny was convicted, Fadgen filed an ex parte motion asking for Johnny's
7 production at petitioner's trial, and the state district court granted it. The court does not know, and
8 probably never will know, why Fadgen thought that Johnny would testify at petitioner's trial.
9 Perhaps, despite all the reasons given above, Johnny actually did write an affidavit or letter in 1997
10 in which he took the blame, and then it was lost. Perhaps petitioner told Fadgen that he believed
11 that Johnny would testify.⁸

12 The prosecutor, Elissa Luzaich, testified at the evidentiary hearing, and she said that she
13 could speculate why Johnny did not testify. The parties disagree over whether Fadgen's reasons not
14 to call Johnny are relevant. The court can think of one obvious reason, based upon Johnny's actual
15 behavior at the time: He would have invoked his privilege against self-incrimination under the Fifth
16 Amendment and the equivalent Nevada constitutional provision. He maintained his innocence
17 throughout trial, at sentencing, and his direct appeal was pending when petitioner was tried.
18 Johnny's testimony would have put an end to his appeal.

19 Nonetheless, Johnny testifies now that he would have testified at petitioner's trial that what
20 led up to the shooting of Dimas was entirely his idea and that petitioner had no knowledge. The
21 court will assume that Johnny would have been granted use immunity and thus would have testified
22
23

24 ⁷Fadgen also argued in part that the defenses of petitioner and Johnny were antagonistic. That argument was
25 true. Each person's defense was to blame the other person.

26 ⁸This possibility has potential support. When in jail, petitioner wrote a letter to Tawsha Orillo. He noted that
27 somebody told him that Johnny would give evidence against petitioner. Petitioner discounted that notion, because he
28 felt that he and Johnny were too close for Johnny to do that.

The prosecution used this letter, heavily redacted, at trial to refute the notion that petitioner and Johnny were
just cousins without a close relationship, and thus to refute the argument that Johnny was acting on his own.

APP. 017

1 at petitioner's trial. Johnny's testimony, like the testimony of any witness, would be subject to
2 cross-examination and impeachment.

3 Johnny's reason for being at Dimas' house does not withstand scrutiny. Again, Johnny
4 testified that petitioner invited him to walk to the residence of Tawsha Orillo so that Johnny could
5 meet Tawsha's sister Angel, and they just happened to walk past Dimas' house while Dimas was
6 outside. As the cross-examination progressed, Johnny gradually forgot that the journey to Tawsha's
7 residence was why he was at Dimas' house, to the point that counsel for respondents had to remind
8 Johnny of his own story. Transcript, at 68 (#74). Johnny complained in cross-examination that
9 counsel for respondents was playing word games with him. Id. at 62 (#74). Counsel for
10 respondents was insistent in his cross-examination of Johnny, but he was not badgering or
11 overbearing. Counsel for respondents was doing nothing more than asking Johnny about the
12 inconsistencies in his own story. Petitioner's two attorneys would have raised objections if they had
13 felt that the questioning was inappropriate, as they did in many other occasions during the hearing.

14 Johnny's intake forms for the Las Vegas Justice Court, a seemingly minor detail, also
15 undermines his story. At the evidentiary hearing, Johnny testified that he was living with someone
16 named Oscar in an apartment across the street from petitioner's house at 4835 Terra Linda Avenue.
17 Transcript, at 8 (#47). The intake forms were completed on October 9 and 22, 1997, shortly after
18 his arrest. Johnny gave as his address 2101 Sandy Lane, Apartment F-8, and he resided with
19 "Tasha," age 18 years, for one month. Ex. 3, at 13-14 (#56). On cross-examination, he said that
20 this person was not Tawsha Orillo, but some other person named Tasha. Transcript, at 61 (#74).
21 Johnny also testified that he did not remember filling out the form and living with this Tasha. Id. at
22 22-24 (#74). This cannot simply be a matter of poor recollection. The name of his roommate and
23 the name of the street are completely different. Johnny lied either on his intake forms or in his
24 evidentiary hearing testimony. If the court cannot believe Johnny on a minor matter, then the court
25 cannot trust his testimony on more meaningful matters.

26 Johnny's evidentiary hearing testimony also is contradicted by testimony at trial. He
27 testified that he grabbed Dimas' hand and pointed a gun at Dimas, then Dimas ducked or jerked, and
28 then he fired the gun unintentionally. Dimas testified to the same thing at trial, although there is a

APP. 018

1 dispute over which hand Johnny used to grab Dimas and which hand Johnny used to hold the gun.
2 Johnny testified that he and petitioner left the school. However, both Dimas and Douzat testified
3 that they ran away after that shot, and then they heard two more shots. Johnny's testimony does not
4 explain the difference in number and timing of shots.

5 Luzaich, the prosecutor, testified at the evidentiary hearing that she was ready to impeach
6 Johnny. First, Johnny had at least one prior adult felony conviction, attempted burglary, and she
7 could have questioned Johnny about what the crimes were and when he had committed them.
8 Second, Johnny had just been acquitted of attempted murder with the use of a deadly weapon and
9 convicted of the lesser-included offense of battery with the use of a deadly weapon. Johnny's
10 testimony that it was all his idea would have exposed him to no more criminal liability. His
11 testimony would not even have affected his appeal because the court has assumed that Johnny
12 would have been granted use immunity. Third, Johnny's own statements in the pre-sentence
13 investigation report and at the sentencing hearing would have contradicted his trial testimony.
14 When his own freedom was at stake, Johnny himself, not just defense counsel following a trial
15 strategy, insisted that he was innocent. Johnny's testimony is exactly the type that needs to be
16 treated with skepticism. See Herrera v. Collins, 506 U.S. 390, 423 (1993) (O'Connor, J.,
17 concurring).

18 In conclusion, Petitioner has presented no reliable evidence that Johnny actually did inform
19 petitioner's counsel in 1997 that Johnny was willing to testify on petitioner's behalf. Neither
20 Johnny nor Gerald are credible witnesses on that issue. Furthermore, even if Johnny testified at
21 trial, he would not have been a credible witness who would have given reliable testimony. He
22 would have been impeached with his own prior inconsistent statements and his criminal record.
23 The court agrees with respondents that, "[f]or the purposes of Schlup at least one reasonable juror
24 would find Johnny [Walker's] statements suspect and still vote that Christian Walker was guilty of
25 attempt murder." Answering Brief, at 19 (#77). Petitioner has not demonstrated actual innocence.

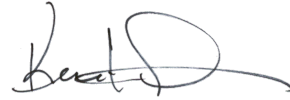
26 Reasonable jurists might debate this conclusion, and the court will issue a certificate of
27 appealability.
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APP. 019

1 IT IS THEREFORE ORDERED that this action is **DISMISSED** with prejudice as untimely.
2 The clerk of the court shall enter judgment accordingly and dismiss this action.

3 IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED** on the issue
4 whether petitioner has demonstrated actual innocence to equitably toll the period of limitation.

5 DATED: March 30, 2016



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7 KENT J. DAWSON
8 United States District Judge
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APP. 020

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MAR 22 2005	
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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CHRISTIAN D. WALKER,

Petitioner,

vs.

JACKIE CRAWFORD, et al.,

Respondents.

Case No. CV-S-04-0929-KJD (LRL)

ORDER

Before the Court are Respondents' Motion to Dismiss (#11), Petitioner's Opposition (#14) and Motion to Attach Supplemental Exhibits (#13), and Respondents' Reply (#18). The Court grants Petitioner's Motion to Attach Supplemental Exhibits (#13), and it grants Respondents' Motion to Dismiss (#11) because the Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (#8) is untimely.

Congress has limited the time in which a person can petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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APP. 021

1 28 U.S.C. § 2244(d)(1). A judgment becomes final when the Supreme Court of the United States
2 denies a petition for a writ of certiorari or when the time to petition for a writ of certiorari expires.
3 Bowen v. Roe, 188 F.3d 1157, 1158-60 (9th Cir. 1999). See also Sup. Ct. R. 13(1). Any time spent
4 pursuing a properly-filed application for state post-conviction review or other collateral review does
5 not count toward this one-year limitation period. 28 U.S.C. § 2244(d)(2). The period of limitations
6 resumes when the post-conviction judgment becomes final. Bunney v. Mitchell, 262 F.3d 973, 974
7 (9th Cir. 2001). See also Glauner v. State, 813 P.2d 1001, 1003 (Nev. 1991) (Nevada judgment
8 does not become final until Supreme Court issues its remittitur). Equitable tolling of the period is
9 also available, but “only if extraordinary circumstances beyond a prisoner’s control make it
10 impossible to file a petition on time.” Lott v. Mueller, 304 F.3d 918, 922 (9th Cir. 2002) (internal
11 quotations and citations omitted).

12 A jury in the Eighth Judicial District Court of the State of Nevada found Petitioner,
13 Christian Doran Walker (“Walker”), guilty of attempted murder with the use of a deadly weapon.
14 That court entered its judgment of conviction on January 19, 1999, and an amended judgment of
15 conviction on May 21, 1999. Amended Petition (#8), App. F, at pp. 5-8. Walker appealed, and the
16 Nevada Supreme Court dismissed his appeal on June 21, 1999. Id., App. C. Walker did not petition
17 for a writ of certiorari, and his judgment of conviction became final on September 20, 1999. Walker
18 then filed a state post-conviction petition for a writ of habeas corpus on July 14, 2003. Id., App. F,
19 at p. 11. The state district court denied his petition as untimely on October 6, 2003. Id., App. F., at
20 p. 69-72. Walker appealed, and the Nevada Supreme Court affirmed the denial on March 5, 2004.
21 Id., App. G.¹ The remittitur from that decision issued no later than March 30, 2004. See Nev. R.
22 App. P. 41(a) (remittitur to issue twenty-five (25) days after entry of judgment). Walker did not
23 allege when he mailed his original Petition (#5) to the Court, but the Court received it on July 2,
24 2004.

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26
27 ¹Walker alleges slightly different dates for the entry of his judgment of conviction and the
28 affirmance of his state habeas corpus petition’s denial. See Amended Petition (#8), at p. 1. The
discrepancy is immaterial.

APP. 022

1 The parties disagree over when the period of limitations started to run. If the date
2 Walker's judgment of conviction became final is the last possible date, then the period of limitations
3 started to run on September 21, 1999. See 28 U.S.C. § 2244(d)(1)(A). On the other hand, Walker
4 maintains that his trial counsel, John P. Fadgen, told him that his direct appeal was still pending in
5 2000, after the Nevada Supreme Court had dismissed it, and that he did not learn about the
6 dismissal in 1999 until after Fadgen died in March 2001. Amended Petition (#8), App. F., at pp. 21-
7 22 (affidavit of Walker). In an affidavit, Fadgen's colleague, Christopher Rasmussen, told Walker
8 about the dismissal after Fadgen's death, in what he recalled was late 2000 or early 2001. Motion to
9 Attach Supplemental Exhibits (#13). James A. Colin was representing Walker on another matter in
10 mid-2001, when Walker asked him to examine possible post-conviction issues in this case.
11 Amended Petition (#8), App. F, at p. 27. The state district court appointed Colin as Walker's post-
12 conviction attorney on August 13, 2001. Id., App. F, at p. 10. Giving Walker every benefit of the
13 doubt, the period of limitations would not have started to run some time between April 1 and
14 August 13, 2001. See 28 U.S.C. § 2244(d)(1)(D).² Using August 13, 2001, § 2244(d)(1)'s period of
15 limitations still would have expired eleven (11) months before Walker filed his state habeas corpus
16 petition. Equitable tolling or an excuse to the statute of limitations is necessary.

17 Colin tried to explain his late filing of Walker's state habeas corpus petition. First,
18 he was waiting for developments in Nevada case law on accomplice liability. Second, he
19 recognized that the state one-year statute of limitations, Nev. Rev. Stat. § 34.726, had expired, but
20 he thought that he did not need to worry until five (5) years after Walker's judgment of conviction
21 had become final, at which time a presumption of prejudice to the state attaches to any habeas
22 corpus petition, Nev. Rev. Stat. § 34.800. However, Colin's failure to consider § 2244(d) does not
23 justify equitable tolling. See Miranda v. Castro, 292 F.3d 1063, 1066-68 (9th Cir.), cert. denied,
24 537 U.S. 1003 (2002); Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001).

27 ²The parties discuss this as an issue of equitable tolling, but it fits within the scope of
28 § 2244(d)(1)(D).

APP. 023

1 Walker also contends that he is actually innocent. Opposition (#14), at pp. 2-3
2 (citing Amended Petition (#8), App. F., at pp. 30-33). The Court can excuse the application of a
3 procedural bar if a constitutional error in the criminal proceedings “resulted in the conviction of one
4 who is actually innocent.” Carrier, 477 U.S. at 496. “To be credible, such a claim requires
5 petitioner to support his allegations of constitutional error with new reliable evidence—whether it
6 be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical
7 evidence—that was not presented at trial.” Schlup v. Delo, 513 U.S. 298, 324 (1995). Walker can
8 present such a claim “if all the evidence, including new evidence, makes it ‘more likely than not that
9 no reasonable juror would have found petitioner guilty beyond a reasonable doubt.’” Gandarela v.
10 Johnson, 286 F.3d 1080, 1086 (9th Cir. 2002) (quoting Schlup, 513 U.S. at 327), cert. denied, 537
11 U.S. 1117 (2003). Actual innocence might excuse application of § 2244(d). See Majoy v. Roe, 296
12 F.3d 770 (9th Cir. 2002).

13 Walker’s argument is unpersuasive. The state charged him with attempted murder
14 under a theory of aiding and abetting his cousin, Johnny Walker, in the shooting of David Dimas. In
15 this action and in his state habeas corpus petition, Walker alleges that before his trial in 1998,
16 Johnny Walker wrote a letter to Fadgen in which he confessed to shooting Dimas and insisted that
17 he acted on his own. Amended Petition (#8), App. F, at pp. 21-25, 28, 30-33. Fadgen did not call
18 Johnny Walker as a witness, nor did he attempt to introduce the letter.

19 Walker never attached this letter to any document in either this action or his state
20 habeas corpus petition. Instead, he produced an affidavit from Johnny Walker, signed in September
21 2002, in which Johnny Walker states that he sent the letter to Fadgen. Amended Petition (#8), App.
22 F, at pp. 24-25. By that time, a jury had acquitted Johnny Walker of attempted murder with the use
23 of a deadly weapon and convicted him of the lesser offense of battery with the use of a deadly
24 weapon, and that conviction had become final. See id., App. F, at p. 33. Johnny Walker’s affidavit
25 exposed him to no criminal liability because he could not be re-tried for attempted murder, and the
26 affidavit would serve only to try to exonerate Walker. It is not trustworthy evidence that the letter
27 existed.

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APP. 024

1 Giving Walker the benefit of the doubt and assuming that Johnny Walker did send a
2 letter to Fadgen, that letter is also not trustworthy evidence. Johnny Walker wrote in his affidavit
3 that he related what happened to Fadgen. First, Walker told Johnny Walker that somebody stole his
4 necklace—the only two possible people were David Dimas and somebody named Lionel - but that
5 he did not want to make a big deal out of it. Later, the two cousins were walking to a friend's house
6 when they encountered Dimas and Dimas's friend Brandon. The four people went to a school,
7 where they smoked some marijuana. Johnny Walker thought that Dimas was looking smug, and so
8 he shot Dimas without thinking. Johnny Walker insisted that Walker had nothing to do with the
9 shooting and had no prior knowledge. Amended Petition (#8), App. F, at p. 24. However, the state
10 already had this evidence from Dimas, who testified that Johnny Walker shot him unexpectedly.
11 Id., App. F, at p. 40. Johnny Walker's confession exposed him to no more criminal liability than
12 what he already faced, and the state already had sufficient evidence to convict him. The sole effect
13 of his confession would have been to try to absolve Walker of any liability. Any prosecutor would
14 have pointed this out to the jury. Even if Johnny Walker's confession was presented to the jury, the
15 Court cannot rule that it was more likely than not that no reasonable juror would have found Walker
16 guilty beyond a reasonable doubt. Walker has not excused the application of the statute of
17 limitations.

18 Walker actually titled his Opposition as "Opposition to Motion to Dismiss and
19 Request for Appointment of Counsel" (emphasis added). Nowhere in that document does Walker
20 present points and authorities in support of that request, and thus he consents to the denial of the
21 request. LR 7-2(d). Additionally, the request is moot because the Court is dismissing this action.

22 IT IS THEREFORE ORDERED that Petitioner's Request for Appointment of
23 Counsel (#15) is **DENIED** as moot.

24 IT IS FURTHER ORDERED that Petitioner's Motion to Attach Supplemental
25 Exhibits (#13) is **GRANTED**.

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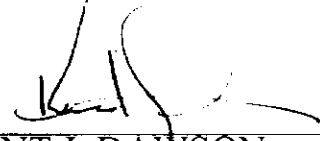
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APP. 025

1 IT IS FURTHER ORDERED that Respondents' Motion to Dismiss (#11) is
2 **GRANTED**. This action is **DISMISSED** with prejudice as untimely. The Clerk of the Court shall
3 enter judgment accordingly.

4 DATED this 18th day of March, 2005.

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7 KENT J. DAWSON
8 United States District Judge
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APP. 026

FILED

NOT FOR PUBLICATION

OCT 29 2012

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

CHRISTIAN WALKER,

Petitioner - Appellant,

v.

E.K. McDANIEL, Warden,

Respondent - Appellee.

No. 08-15628

D.C. No. 04-CV-00929-KJD

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Argued and Submitted October 19, 2012
San Francisco, California

Before: **BEA** and **WATFORD**, Circuit Judges, and **SESSIONS**, District Judge.**

Christian Walker appeals from the denial of his petition for habeas corpus, which the district court dismissed as untimely. Walker concedes his petition is untimely but seeks equitable tolling of 28 U.S.C. § 2244(d)'s one-year statute of

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

APP. 027

Page 2 of 6

limitations based on misconduct of his lawyers and evidence of his actual innocence that was not presented at trial. We affirm the district court's denial of equitable tolling based on attorney misconduct but vacate the district court's denial of equitable tolling based on evidence of actual innocence. We remand for an evidentiary hearing to determine if the evidence of Walker's innocence warrants equitable tolling.

1. Attorney misconduct may warrant equitable tolling if a petitioner has been diligent in the face of egregious misconduct. *Holland v. Florida*, 130 S. Ct. 2549, 2562-64 (2010). Drawing every inference in Walker's favor, his attorneys' conduct cannot excuse his late filing. Walker first claims that he is entitled to equitable tolling because his attorney on direct appeal failed to notify him that the Nevada Supreme Court had affirmed his conviction. Even if the statute of limitations were tolled until March 2001, the date Walker says he learned his appeal was denied, that would not excuse his more than three-year delay in filing a federal habeas corpus petition on July 2, 2004.

Walker next claims that his post-conviction counsel committed egregious misconduct by continuing to represent Walker in this case after Walker filed a habeas corpus petition alleging that counsel provided ineffective assistance in another matter—Walker's conviction for the murder of a different victim.

APP. 028

Page 3 of 6

However, Walker did not file the petition alleging counsel's ineffective assistance in the other case until October 15, 2002. Again, even if we credited Walker's allegation that a conflict of interest arose as of that date, Walker has failed to establish a basis for equitable tolling of the statute of limitations between March 2001 and October 15, 2002. That period of more than a year renders Walker's petition untimely.

2. Equitable tolling may be required when a petitioner supports "allegations of constitutional error with new reliable evidence" that he is actually innocent, such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" that was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). A court must grant equitable tolling when the newly presented evidence makes it more likely than not that no reasonable juror would convict the petitioner. *Id.* at 327; *Lee v. Lampert*, 653 F.3d 929, 938 (9th Cir. 2011) (en banc).

Walker was convicted of the attempted murder of David Dimas. His newly presented evidence is an affidavit from his cousin Johnny Walker, who actually shot Dimas. According to Johnny Walker's affidavit, he sent Walker's attorney a letter before he and Walker were tried. Johnny Walker avers that in his letter, he claimed sole responsibility for shooting Dimas. This letter was not introduced into evidence, and Johnny Walker did not testify, at Walker's trial. Johnny Walker's

APP. 029

Page 4 of 6

affidavit is therefore “newly presented” evidence for purposes of *Schlup* even though it may have been available at the time of Walker’s trial. *See Griffin v. Johnson*, 350 F.3d 956, 961-63 (9th Cir. 2003).

The district court denied Walker’s request for equitable tolling because it concluded that Johnny Walker’s post-trial affidavit was not “trustworthy evidence” of Walker’s innocence. The court based this conclusion on the view that no juror would have found Johnny Walker’s testimony credible. The court reached this conclusion without reviewing Walker’s trial record and without assessing Johnny Walker’s credibility at an evidentiary hearing.

Based on the unique facts of this case, we conclude that the district court abused its discretion by rejecting Walker’s actual innocence claim without holding an evidentiary hearing. When assessing the likelihood that newly presented evidence would change a verdict, habeas courts must consider the full trial record. *Lee*, 653 F.3d at 938. Because the examination of the record and the newly presented evidence is “fact-intensive,” *Majoy v. Roe*, 296 F.3d 770, 777 (9th Cir. 2002) (quoting *Schlup*, 513 U.S. at 332), an evidentiary hearing is required when the record shows that “circumstances consistent” with a petitioner’s claims would justify equitable tolling. *Laws v. Lamarque*, 351 F.3d 919, 924 (9th Cir. 2003).

APP. 030

Page 5 of 6

The circumstances surrounding the submission of Johnny Walker’s affidavit are consistent with its trustworthiness. This is unlike the typical case in which a petitioner claiming actual innocence presents suspiciously late affidavits—such as affidavits from non-eyewitnesses who are in prison or were acquitted—that a court could deem inherently untrustworthy. Here, Johnny Walker’s affidavit is consistent with an affidavit that Walker’s attorney, John Fadgen, submitted in support of a severance motion before either Walker or Johnny Walker were tried. Fadgen’s affidavit states that he had “learned that if tried separately, Johnny Hughes Walker would testify that Christian D. Walker did not know that David Dimas was going to be shot.”

The district court reasoned that Johnny Walker’s affidavit was unreliable because it was drafted after his own acquittal of the attempted murder of Dimas and therefore “exposed him to no criminal liability” while exonerating Walker. In fact, however, Fadgen’s affidavit suggests that Johnny Walker offered testimony inculcating himself and exonerating Walker before his own trial. Fadgen’s affidavit therefore gives Johnny Walker’s statements an indicia of trustworthiness lacking in other cases involving “11th hour” affidavits produced long after the underlying criminal events. *Cf. Herrera v. Collins*, 506 U.S. 390, 423 (1993).

APP. 031

Page 6 of 6

In addition, the trial record does not contradict Johnny Walker’s account of the shooting in a way that permitted the district court to conclude that, even if Johnny Walker had testified at trial consistently with his affidavit, the jury would not have believed him. No witness spoke directly about Walker’s intent to kill Dimas, and no witness testified that Johnny Walker acted on Walker’s instruction and not on his own impulse. Given this state of the record, it would be inappropriate for a court on collateral review to decide the contested issue of Johnny Walker’s credibility “based on affidavits alone.” *Buffalo v. Sunn*, 854 F.2d 1158, 1165 (9th Cir. 1988); *see also Roy v. Lampert*, 465 F.3d 964, 975 (9th Cir. 2006).

For these reasons, an evidentiary hearing is required to determine whether Johnny Walker’s newly presented testimony makes it more likely than not that no reasonable juror would convict Walker.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

APP. 032

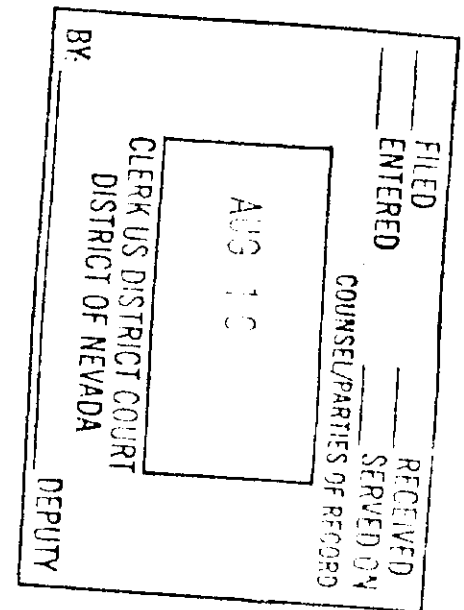
CHRISTIAN DORAN WALKER
 Name
60225
 Prison Number
HIGH DESERT STATE PRISON
 Place of Confinement

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 COUNSEL/PARTIES OF RECORD

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CLERK US DISTRICT COURT
 DISTRICT OF NEVADA

DEPUTY



**UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA**

CHRISTIAN D. WALKER, Petitioner,
 (Full Name)

vs.

JACKIE CRAWFORD, et al., Respondent,
 (Name of Warden, Superintendent, jailor or
 authorized person having custody of petitioner)

and

The Attorney General of the State of Nevada

CV-S-04-0929-KJD-LRL

**PETITION FOR A
 WRIT OF HABEAS CORPUS
 PURSUANT TO 28 U.S.C. § 2254
 BY A PERSON IN STATE CUSTODY
 (NOT SENTENCED TO DEATH)**

- Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: EIGHTH JUDICIAL DISTRICT COURT, JUDGE JOHN S. McGROARATY
- Full date judgment of conviction was entered: 1 / 5 / 1999 (month/day/year)
- Did you appeal the conviction? ☒ Yes ☐ No. Date appeal decided: 6 / 21 / 1999
- Did you file a petition for post-conviction relief or petition for habeas corpus in the state court?
☒ Yes ☐ No. If yes, name the court and date the petition was filed: 8th JUDICIAL DISTRICT COURT 7 / 14 / 2003. Did you appeal from the denial of the petition for post-conviction relief or petition for writ of habeas corpus? ☒ Yes ☐ No. Date the appeal was decided: 5 / 5 / 2004. Have all of the grounds stated in this petition been presented to the state supreme court? ☐ Yes ☒ No. If no, which grounds have not? THE MAJORITY OF GROUND ONE, GROUND TWO, GROUND THREE, AND GROUND FOUR.
- Date you are mailing (or handing to correctional officer) this petition to this court: / /

Attach to this petition a copy of all state court written decisions regarding this conviction.

FILED SEPARATELY

#5

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APP. 034

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my SIXTH and FOURTEENTH Amendment right to EFFECTIVE ASSISTANCE OF COUNSEL, based on these facts:

PETITIONER'S CONVICTION MUST BE REVERSED BECAUSE THE INNEFFECTIVE ASSISTANCE OF HIS DEFENSE COUNSEL DURING TRIAL DENIED HIM DUE PROCESS OF LAW UNDER BOTH THE UNITED STATES CONSTITUTION AND NEVADA CONSTITUTION.

A. FAILURE TO USE JOHNNY WALKER'S (CO-DEFENDANT) CONFESSION.

B. ADDITIONAL CUMULATIVE ERRORS FO DEFENSE COUNSEL.

1. DEFENSE COUNSEL MISINFORMED PETITIONER CONCERNING HIS RIGHT TO TESTIFY.

2. DEFENSE COUNSEL THREATENED TO WITHDRAW FROM THE CASE IF PETITIONER TESTIFIED.

3. DEFENSE COUNSEL FAILED TO OBJECT TO PROSECUTION'S INACCURATE DEFINITION OF REASONABLE DOUBT DURING CLOSING ARGUMENT.

4. DEFENSE COUNSEL FAILED TO PROPERLY OBJECT TO A CHALLENGED JURY INSTRUCTION.

DEFENSE COUNSEL WAS FURTHER INEFFECTIVE FOR (1) FAILING TO RAISE MERITORIOUS ISSUES ON DIRECT APPEAL THAT HAD BEEN REQUESTED BY PETITIONER, AND (2) THEN FAILING TO INFORM PETITIONER OF THE DISMISSAL OF HIS DIRECT APPEAL BY ACTUALLY TELLING HIM THE APPEAL WAS STILL PENDING AFTER IT HAD BEEN DISMISSED.

SEE APPENDIX

APP. 036

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 2

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my SIXTH and FOURTEENTH Amendment right to A FAIR TRIAL, based on these facts:

INACCURATE STATE DEFINITION OF REASONABLE DOUBT EXACERBATED BY ERRONEOUS
JURY INSTRUCTIONS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS AND
CONSTITUTED REVERSIBLE ERROR.

SEE APPENDIX

___ Yes X No. If no, explain why not: INEFFECTIVE ASSISTANCE OF COUNSEL.

X Yes No. If no, explain why not:

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue? X Yes ___ No. If no, explain why not:

___ Yes ___ No. If yes, explain why:

Did you receive an evidentiary hearing? ☐ Yes ☐ No. Did you appeal to the Nevada Supreme Court? ☐ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not:

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ☐ Yes ☐ No. If yes, explain: _____

APP. 038

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 3

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my SIXTH and FOURTEENTH Amendment right to A FAIR TRIAL, based on these facts:

ERRONEOUS JURY INSTRUCTIONS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS
AND CONSTITUTED REVERSIBLE ERROR.

SEE APPENDIX

APP. 039

Exhaustion of state court remedies regarding Ground 3:▶ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

 X Yes No. If no, explain why not: _____▶ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

 X Yes No. If no, explain why not: _____If yes, name of court: 8th JUDICIAL DISTRICT date petition filed 7 / 14 / 03Did you receive an evidentiary hearing? Yes X No. Did you appeal to the Nevada Supreme Court? X Yes No. If no, explain why not: _____If yes, did you raise this issue? X Yes No. If no, explain why not: _____▶ **Second Post Conviction:**Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus? Yes No. If yes, explain why: _____

If yes, name of court: _____ date petition filed ____ / ____ / ____

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____If yes, did you raise this issue? Yes No. If no, explain why not: _____▶ **Other Proceedings:**Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: _____

APP. 040

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 4

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my SIXTH and FOURTEENTH Amendment right to A FAIR TRIAL, based on these facts:

JUROR MISCONDUCT CONSTITUTED REVERSIBLE ERROR.

SEE APPENDIX

- ▶ **Direct Appeal:**

— Yes x No. If no, explain why not: INEFFECTIVE ASSISTANCE OF COUNSEL.

► **First Post Conviction:**

 x Yes No. If no, explain why not:

If yes, name of court: 8th JUDICIAL DISTRICT date petition filed 7 / 14 / 03

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue? X Yes ___ No. If no, explain why not:

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

___ Yes ___ No. If yes, explain why:

If yes, name of court: _____ date petition filed ____/____/____

Did you receive an evidentiary hearing? ☐ Yes ☐ No. Did you appeal to the Nevada Supreme Court? ☐ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not:

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ☐ Yes ☐ No. If yes, explain: _____

APP. 042

WHEREFORE, petitioner prays that the court will grant him such relief to which he is entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.

Christian Walker

(Name of person who wrote this
complaint if not Plaintiff)

Christian Walker

(Signature of Plaintiff)

6/29/04

(Date)

(Signature of attorney, if any)

(Attorney's address & telephone number)

DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.**
See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at HIGH DESERT STATE PRISON on 6/29/04
(Location) (Date)

Christian Walker
(Signature)

60225
(Inmate prison number)

APP. 043

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN D. WALKER,

Appellant,

vs.

Case No. : 33637

THE STATE OF NEVADA

Respondent,

FAST TRACK STATEMENT

1. Name of part filing this fast track statement:

Christian D. Walker

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

John P. Fadgen, Esq.
616 South Third Street
Las Vegas, Nevada 89101
(702)-384-7286

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

John P. Fadgen, Esq.
616 South Third Street
Las Vegas, Nevada 89101
(702)-384-7286

4. Judicial district, county, and district court docket number of lower court proceedings:

Eighth Judicial District, Clark County, Docket Number C14649

5. Name of judge issuing decision, judgment, or order appealed from:

John S. McGroarty, Department No. XVI

6. Length of trial. If this action proceeded to trial in the district court, how many days did the trial last:

APP. 044

1 3 days.

2 7. **Conviction (s) appealed from:**

3 Attempted Murder with the use of deadly weapon.

4 8. **Sentence for each count:**

5 Minimum of 48 months and a maximum of 120 months, with equal and consecutive 48
6 month minimum, 120 month maximum for use of a firearm.

7 9. **Date district court announced decision, sentence, or order appealed from:**

8 January 5, 1999.

9 10. **Date of entry of written judgment or order appealed from:**

10 The judgment was a jury verdict.

11 11. **If this appeal is form an order granting or denying a petition for a writ of habeas
12 corpus, indicate the date written notice of entry of judgement of order was served
13 by the court:**

14 N/A

15 12. **If the time for filing the notice of appeal was tolled by a post - judgment motion:**

16 N/A

17 13. **Date notice of appeal filed:**

18 January 20, 1999.

19 14. **Specify statue or rule governing the time limit for filing the notice of appeal, e.g., NRAP
20 4 (b), NRS 34.560, NRS 34.575, NRS 177.015, or other:**

21 NRAP 4(b)

22 15. **Specify statue, rule or other authority which grants this court jurisdiction to review the
23 judgement or order appealed:**

24 NRAP 4(b)

25 16. **Specify the nature of disposition below, e.g., judgment after bench trial, judgement
26 after jury verdict, judgment upon guilty plea, etc.:**

27

28

APP. 045

1 Judgment of guilty upon jury verdict.

2 17. Pending and prior proceedings in this court. List the case name and docket number
3 of all appeal or original proceedings presently or previously pending before this court
4 which are related to this appeal (e.g., separate appeals by co-defendants, appeal after
5 post - conviction proceedings):

6 None.

7 18. Pending and prior proceedings in other court. List the case name, number and court
8 of all pending and prior proceedings in other courts which are related to this appeal
9 (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings
10 against co-defendants):

11 N/A

12 19. Proceedings raising same issues. List the case name and docket number of all appeals
13 or original proceedings presently pending before this court, of which you are aware,
14 which raise the same issues you intend to raise in this appeal:

15 I am not aware of any.

16 20. Procedural history. Briefly describe the procedural history of the case (provide
17 citations for every assertion of fact to the appendix, if any, or to the rough draft
18 transcript¹):

19 Christian Walker was charged on an information on or about the 22nd day of September,
20 1997. Count 1- Attempt Murder with use of a deadly weapon. Count 2- Battery with use of a deadly
21 weapon. (Appendix, P. 1-2).

22 The Defendant was found guilty by jury verdict on November 5, 1998, and was sentenced
23 to a minimum of 48 months and a maximum of 120 months, with equal and consecutive 48 month
24 minimum, 120 month maximum for use of a firearm.

25
26 ¹Appellant has sent full transcripts to the Court instead of rough draft transcripts, thus the
27 Court has possession of all transcripts from voir dire through sentencing in this matter.

APP. 046

1 The notice of appeal was filed on January 20, 1999.

2 **21. Statement of facts. Briefly set forth the facts material to the issues on appeal:**

3 On or about September 22, 1997, Christian Walker and Johnny Walker were accused of
4 shooting David Dimas in the neck in the late evening hours at/or near the JM Ullom Elementary
5 School. Both were charged with attempted murder with the use of a deadly weapon and battery with
6 use of a deadly weapon. The two Defendants were tried separately and Johnny Walker was found
7 guilty of Attempted Murder with the use of a deadly weapon. Christian Walker was found guilty
8 of both attempted murder with the use of a deadly weapon and battery with the use of a deadly
9 weapon. Johnny Walker was the defendant who displayed the weapon and shot the victim.
10 Christian Walker accompanied David Dimas to the park where Johnny Walker was present, the three
11 were going to smoke marijuana. There was evidence presented during the trial that Christian Walker
12 believed the victim stole a necklace from him and was motivated by this belief in coaxing the victim
13 to the park area.

14 During the trial of Christian Walker, Defendant's counsel objected to the jury instructions,
15 specifically the instruction that failed to state that the jury must find that Christian Walker had the
16 intent to aid and abet Johnny Walker to be found guilty of attempted murder. (See Jury Instruction
17 ~~20, Appendix p. 22~~) This instruction was admitted over the objection of defense counsel. The
18 instruction that was submitted to the jury did not contain the language regarding the specific intent
19 needed to commit an attempt crime such as attempted murder. Also, Jury Instruction 21, does not
20 address the proper specific intent requirement for attempted murder. (Appendix p. 23).

21 **22. Issues on appeal. State concisely the principal issue(s) in this appeal:**

22 The jury instructions submitted to the jury were improper and should have included an
23 instruction that the jury must find intent in order to find guilt for the crime of aiding and abetting.

24 **23. Legal argument, including authorities.**

25 I.

26 **IN ORDER TO FIND CHRISTIAN WALKER GUILTY THE JURY**
27 **MUST HAVE FOUND HIM GUILTY ON EACH AND EVERY**

APP. 047

ELEMENT OF THE CRIME

The jury must have analyzed each and every element to conclude that Christian Walker is guilty beyond a reasonable doubt. A jury verdict that he is guilty of the crime means, of course, a verdict that he is guilty of each necessary element of the crime. United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 2319-20, 132 L.Ed.2d 444 (1995). The jury instruction in questions is Instruction Number 20 and reads as follows:

Where several parties join together in a common design to commit any unlawful act, each is criminally responsible for the acts of his confederates committed in furtherance of the common design. In contemplation of law, the act of one is the act of all.

(Appendix p. 22).

This instruction misstates and misapplies the law. Christian Walker was convicted of Attempted Murder for aiding and abetting his cousin Johnny Walker. This instruction fails to state the proper elements of aiding and abetting. An aider and abettor must have intent to be convicted of the offense. In People v. Beeman, 35 Cal.3d 547, 674 P.2d 1318, (1984), the California Supreme Court sitting en banc stated that "There is no question that an aider and abettor must have criminal intent in order to be convicted of a criminal offense." Beeman 35 Cal.3d at 556. Instruction 20 misstated the law and confused the jury as to the proper elements required to find a verdict of guilt. Although, Christian Walker may have joined his cousin Johnny Walker at the park, there must be the element of intent proven beyond a reasonable doubt for the jury to find guilt on the Attempted Murder charge.

An erroneous jury instruction is judged by the harmless error standards enunciated in Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) and O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). The standard is set forth as "whether the error had substantial and injurious effect or influence in determining the jury's verdict" Brecht, supra at 637, 113 S.Ct., at 1722 (citing Kotteakos v United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). Clearly, there was substantial and injurious effect or influence in the jury's determination of the verdict because the jury was not properly

APP. 048

1 instructed to find that Christian Walker acted with intent when he brought the victim to the park
2 where his cousin fired the gun at the victim. Thus, the convictions against Christian Walker for
3 Attempted Murder with the use of a deadly weapon and Battery with a deadly weapon should be
4 reversed by this Court.

5 **24. Preservation of issues. State concisely how each enumerated issue on appeal**
6 **was preserved during trial. If the issue was not preserved, explain why this**
7 **court should review the issue:**

8 The issue was preserved by defense counsel's objections to the jury instructions.

9 **25. Issues on first impression or of public interest. Does this appeal present a**
10 **substantial legal issue of first impression in this jurisdiction or one affecting**
11 **an important public interest? If so, explain:**

12 No.

13
14 Respectfully submitted:

15
16
17 JOHN P. FADGEN, ESQ.
18 Bar No. 1736
19 616 South Third Street
20 Las Vegas, Nevada 89101
21 (702) 384-7286
22 Attorney for Appellant
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APP. 049

VERIFICATION

I recognize that pursuant to NRAP 3(c) I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 4 day of May, 1999.

JOHN P. EADGEN, ESQ.
Bar No. 1736
616 South Third Street
Las Vegas, Nevada 89101
(702) 384-7286

APP. 050

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN D. WALKER,

Appellant,

vs.

THE STATE OF NEVADA

Respondent,

Case No. : 33637

APPELLANT'S APPENDIX TO FAST TRACK STATEMENT

Name of Court Below: Eighth Judicial District Court

Name of Counsel Representing Appellant: John P. Fadgen, Esq.
Nevada Bar No. 1736
616 South Third Street
Las Vegas, Nevada 89101
(702)-384-7286

APP. 051

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APP. 052

Mike O'Callahan

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOHNNY HUGHES WALKER, JR., #1421028
CHRISTIAN D. WALKER, #1507623

Defendants.

CASE NO. 97F14557A-B

CRIMINAL COMPLAINT

The Defendants above named having committed the crimes of ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.330, 193.165 and BATTERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.481), in the manner following, to-wit: That the said Defendants, on or about the 22nd day of September, 1997, and within the County of Clark, State of Nevada,

COUNT I - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

did then and there, without authority of law and malice aforethought, wilfully and feloniously attempt to kill DAVID DIMAS, a human being, by shooting at and into the body of the said DAVID DIMAS, with a deadly weapon, to-wit: a firearm; defendants aiding or abetting each other in the commission of the crime by accompanying each other to the crime scene where defendant CHRISTIAN D. WALKER lured DAVID DIMAS to an area where defendant JOHNNY HUGHES WALKER, JR. displayed a firearm and shot DAVID DIMAS; the defendants acting in concert throughout; the defendants acting as lookouts for each other and the defendants leaving the crime scene together.

COUNT II - BATTERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously use force or violence upon the person of another, to-wit: DAVID DIMAS, with use of a deadly weapon, to-wit: a firearm, by shooting at and into the body of the said DAVID DIMAS with said firearm; defendants aiding or abetting each other in the commission of the crime by accompanying each other to the crime

APP. 053

1 scene where defendant CHRISTIAN D. WALKER lured DAVID DIMAS to an area where
2 defendant JOHNNY HUGHES WALKER, JR. displayed a firearm and shot DAVID DIMAS
3 the defendants acting in concert throughout; the defendants acting as lookouts for each other and
4 the defendants leaving the crime scene together.

5 All of which is contrary to the form, force and effect of Statutes in such cases made and
6 provided and against the peace and dignity of the State of Nevada. Said Complainant makes this
7 declaration subject to the penalty of perjury.

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ATT MURDER W/W; BWDW - F
(TK6)

APP. 054

1 INST

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DISTRICT COURT
CLARK COUNTY, NEVADA

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8 THE STATE OF NEVADA,

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Plaintiff,

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-vs-

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CHRISTIAN D. WALKER

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Defendant.

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Case No. C146419B
Dept. No. XVI
Docket U

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INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

16

MEMBERS OF THE JURY:

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It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

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You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

APP. 055

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

APP. 056

INSTRUCTION NO. 3

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Information that on or about the 22nd day of September 1997, the Defendant committed the offenses of:

COUNT I - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

did then and there, without authority of law and malice aforethought, wilfully and feloniously attempt to kill DAVID DIMAS, a human being, by shooting at and into the body of the said DAVID DIMAS, with a deadly weapon, to-wit: a firearm; defendant and JOHNNY HUGHES WALKER aiding or abetting each other in the commission of the crime by accompanying each other to the crime scene where CHRISTIAN D. WALKER lured DAVID DIMAS to an area where defendant JOHNNY HUGHES WALKER, JR., displayed a firearm and shot DAVID DIMAS; the defendant and JOHNNY HUGHES WALKER acting in concert throughout; the defendant and JOHNNY HUGHES WALKER acting as lookouts for each other and the defendant and JOHNNY HUGHES WALKER leaving the crime scene together whereby each is responsible under one or more of the following principles of criminal liability to-wit: (1) by having directly committed said offense; (2) by aiding or abetting each other by acting in concert in its commission; and/or (3) by conspiring with each other to commit said offense whereby each is vicariously liable for the acts of the other in furtherance of the conspiracy in its commission.

COUNT II - BATTERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously use force or violence upon the person of another, to-wit: DAVID DIMAS, with use of a deadly weapon, to-wit: a firearm, by shooting at and into the body of the said DAVID DIMAS, with said firearm; defendant and JOHNNY HUGHES WALKER aiding or abetting each other in the commission of the crime by accompanying each other to the crime scene where CHRISTIAN D. WALKER lured DAVID DIMAS to an area where JOHNNY HUGHES WALKER, JR., displayed a firearm and shot DAVID DIMAS; the defendant and JOHNNY HUGHES WALKER acting in concert

APP. 057

INSTRUCTION NO. 4

The elements of an attempt to commit murder are:

- 1) the intent to commit the murder;
- 2) performance of some act towards its commission; and
- 3) failure to consummate its commission.

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APP. 058

INSTRUCTION NO. 3

Attempt murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intent to unlawfully to kill.

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APP. 059

INSTRUCTION NO. 6

Intention may be ascertained or deduced from the facts and circumstances of the attempted killing, such as use of an instrumentality calculated to produce death, the manner of the use and the attendant circumstances characterizing the act.

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APP. 060

INSTRUCTION NO. 7

When a person has once done things which constitute an attempt to commit a crime, he cannot avoid responsibility by failing to proceed further to commit that crime, either by reason of voluntarily abandoning his purpose or because he was prevented or interfered with in completing the crime.

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APP. 061

INSTRUCTION NO. 8

You are instructed that if you find the defendant guilty of Attempt Murder you must determine whether or not a deadly weapon was used in the commission of this crime.

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APP. 062

INSTRUCTION NO. 7

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2 A deadly weapon is any weapon, device, instrument, material or substance which, und
3 the circumstances in which it is used, attempted to be used or threatened to be used, is readi
4 capable of causing substantial bodily harm or death.
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APP. 063

INSTRUCTION NO. 10

The State is not required to have recovered the deadly weapon used in an alleged crime or to produce the deadly weapon in court at trial, to establish that a deadly weapon was used in the commission of the crime.

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APP. 064

INSTRUCTION NO. 11

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2 If you find beyond a reasonable doubt that a defendant committed Attempt Murder w
3 the Use of a Deadly Weapon, then you are instructed that the verdict of Attempt Murder w
4 the Use of a Deadly Weapon is the appropriate verdict.

5 If, however, you find that a deadly weapon was not used in the commission of t
6 Attempt Murder, but you do find that an Attempt Murder was committed, then you are instruct
7 that the verdict of Attempt Murder without the Use of a Deadly Weapon is the appropriat
8 verdict.

9 You are instructed that you cannot return a verdict of both Attempt Murder with the U
10 of a Deadly Weapon and Attempt Murder without the Use of a Deadly Weapon.

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APP. 065

INSTRUCTION NO. 12

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2 When it is impossible to commit a particular crime without committing, at the same ti
3 and by the same conduct, another offense of lesser grade or degree, the latter is, with respec
4 the former, a "lesser included offense."

5 If you are not satisfied beyond a reasonable doubt that the defendant is guilty
6 Attempted Murder, he may be found guilty of the charged lesser included offense, if t
7 evidence is sufficient to establish his guilt of such lesser offense beyond a reasonable doub

8 Battery With a Deadly Weapon is a lesser included offense of Attempted Murder W
9 Use of a Deadly Weapon. Thus, you may only return a verdict of Battery With a Deac
10 Weapon if you rule out Attempt Murder.

11 You are further advised that you may only return a verdict of Attempt Murder wi
12 Deadly Weapon or Battery with Deadly Weapon. You may only return a verdict of guilty to o
13 (1) of the two (2) charges.

APP. 066

INSTRUCTION NO. 13

Battery means any willful and unlawful use of force or violence upon another pers
If that force is accomplished with the use of a deadly weapon then the crime is Battery with
Use of a Deadly Weapon.

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APP. 067

INSTRUCTION NO. 124

Every person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a crime is a principal, and shall be proceeded against and punished as such.

APP. 068

INSTRUCTION NO. 15

A person may be found guilty of attempted murder or battery with a weapon even if he personally did not commit the act or acts constituting the offense charged, if he aided and abetted the commission of the attempted murder or battery with a weapon.

To prove a defendant guilty of aiding and abetting, the State must prove:

First, the crime of attempted murder or battery with a weapon was committed;

Second, the defendant knowingly aided, counseled, commanded, induced or procured Johnny Hughes Walker to commit attempted murder or battery with a weapon.

APP. 069

INSTRUCTION NO. 16

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You are instructed that presence, companionship, and conduct before, during and aft
the offense are circumstances from which one's participation in the criminal intent may b
inferred.

APP. 070

INSTRUCTION NO. _____

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt the defendant was a participant and not merely a knowing spectator.

APP. 071

INSTRUCTION NO. 18

A conspiracy is an agreement between two or more persons to commit any criminal c
unlawful act.

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APP. 072

INSTRUCTION NO. 19

It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

APP. 073

glt -

INSTRUCTION NO. 20

Where several parties join together in a common design to commit any unlawful act, each is criminally responsible for the acts of his confederates committed in furtherance of the common design. In contemplation of law, the act of one is the act of all.

APP. 074

INSTRUCTION NO. 21

1
2 To constitute the crime charged, there must exist a union or joint operation of an a
3 forbidden by law and an intent to do the act.

4 The intent with which an act is done is shown by the facts and circumstances surroundir
5 the case.

6 Do not confuse intent with motive. Motive is what prompts a person to act. Intent refe:
7 only to the state of mind with which the act is done.

8 Motive is not an element of the crime charged and the State is not required to prove
9 motive on the part of the Defendant in order to convict. However, you may consider evidenc
10 of motive or lack of motive as a circumstance in the case.

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APP. 075

INSTRUCTION NO. 22

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such condition that they can say they feel an abiding conviction of the truth of the charge, there is no reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

APP. 076

INSTRUCTION NO. 23

You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

APP. 077

INSTRUCTION NO. 24

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

APP. 078

INSTRUCTION NO. 23

1
2 The credibility or believability of a witness should be determined by his manner upon t
3 stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity
4 have observed the matter to which he testified, the reasonableness of his statements and t
5 strength or weakness of his recollections.

6 If you believe that a witness has lied about any material fact in the case, you m
7 disregard the entire testimony of that witness or any portion of his testimony which is not prove
8 by other evidence.

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APP. 079

INSTRUCTION NO. 26

1
2 A witness who has special knowledge, skill, experience, training or education in
3 particular science, profession or occupation is an expert witness. An expert witness may give
4 his opinion as to any matter in which he is skilled.

5 You should consider such expert opinion and weigh the reasons, if any, given for it. You
6 are not bound, however, by such an opinion. Give it the weight to which you deem it entitled
7 whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for
8 it are unsound.

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APP. 080

INSTRUCTION NO. 27

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2 Although you are to consider only the evidence in the case in reaching a verdict, you must
3 bring to the consideration of the evidence your everyday common sense and judgment of
4 reasonable men and women. Thus, you are not limited solely to what you see and hear as the
5 witnesses testify. You may draw reasonable inferences from the evidence which you feel are
6 justified in the light of common experience, keeping in mind that such inferences should not be
7 based on speculation or guess.

8 A verdict may never be influenced by sympathy, prejudice or public opinion. Your
9 decision should be the product of sincere judgment and sound discretion in accordance with
10 these rules of law.

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APP. 081

INSTRUCTION NO. 28

In your deliberation you may not discuss or consider the subject of punishment, as this is a matter which lies solely with the court. Your duty is confined to the determination of the guilt or innocence of the Defendant.

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APP. 082

INSTRUCTION NO. 29

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

APP. 083

INSTRUCTION NO. 32

1
2 If, during your deliberation, you should desire to be further informed on any point of
3 or hear again portions of the testimony, you must reduce your request to writing signed by
4 foreperson. The officer will then return you to court where the information sought will be gi
5 you in the presence of, and after notice to, the district attorney and the Defendant and his/
6 counsel.

7 Readbacks of testimony are time-consuming and are not encouraged unless you deem
8 a necessity. Should you require a readback, you must carefully describe the testimony to be re
9 back so that the court reporter can arrange his/her notes. Remember, the court is not at liber
10 to supplement the evidence.

28

APP. 084

INSTRUCTION NO. 34

Now you will listen to the arguments of counsel who will endeavor to aid you to render a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be governed by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN: _____
DISTRICT JUDGE

APP. 085

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

CHRISTIAN D. WALKER,)

Appellant,)

v.)

CASE NO. 33637

THE STATE OF NEVADA,)

Respondent.)

FILED

MAY 28 1999

FAST TRACK RESPONSEJANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

James Tufeland
Clark County District Attorney's Office
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4843

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None

5. Procedural history.

The state agrees with the procedural history set out in the fast track appeal.

6. Statement of facts.

On September 22, 1997 the Appellant was charged with attempt murder with use of a deadly weapon and battery with use of a deadly weapon. (Appellant's

RECEIVED

MAY 28 1999

CLERK OF SUPREME COURT
By _____
DEPUTY CLERK

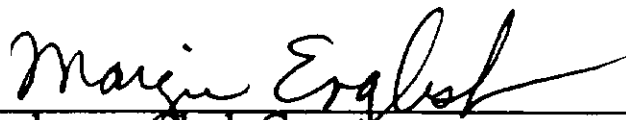
aa - 04431

APP. 086

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing FAST
TRACK RESPONSE to the attorney of record listed below on this 27th day of May
1999.

JOHN P. FADGEN, ESQ.
616 South Third Street
Las Vegas, Nevada 89101



Employee, Clark County
District Attorney's Office

TUFTELANDj/Kevin Hanratty/english

1 Appendix AA pp. 1-2). On November 5, 1998, after a three day trial, the Appellant
2 was found guilty by a jury of attempt murder with use of a deadly weapon.
3 (Respondent's Appendix RA p. 449). The Appellant's cousin, the actual shooter in
4 the attempted murder, was tried separately and also convicted of attempt murder
5 with use of a deadly weapon.

6 Evidence at trial showed the Appellant and victim had a dispute earlier in the
7 day about the Appellant's gold chain.(RA pp. 44-51). The Appellant, victim, and
8 three others had smoked some marijuana at a local school where the Appellant had
9 passed around his gold chain.(RA pp. 39-42). Leaving the scene without the chain,
10 the Appellant later returned to the victim's home to inquire about the chain.(RA p.
11 45) Returning again to the victim's home the Appellant with his mother threatened
12 to take the victim to court over the chain.(RA p. 50). Subsequently some 5-6 hours
13 later, Appellant, with his cousin Johnny Walker, who the victim of the shooting did
14 not know and had never seen before, returned again to the victim's residence.(RA
15 p. 56). Upon inquiry by the Appellant or the Appellant's cousin about smoking
16 some more marijuana, the victim and a friend accompanied the two across the street
17 to the school that had been the spot of the earlier gathering to smoke marijuana.(RA
18 pp. 56-58). The victim, after smoking one joint, was shot through the neck by the
19 Appellant's cousin.(RA p. 60). While attempting to flee the scene, the victim and his
20 friend were shot at two more times but did not receive any further injuries. (RA p.
21 65).

22 At the close of trial the jury was given 31 instructions in which it was
23 informed of the law relevant to the information. The judge then instructed the jury
24 based on all such matters of law that it deemed necessary for the jury to render a
25 verdict based on the information.

26 7. Issue on appeal.

27 Whether the jury instructions given to the jury, most notably Instruction 20,
28 represent the law of Nevada as it applies to the information in the charge of attempt

1 murder with use of a deadly weapon and whether the instructions were necessary
2 for the jury to render a verdict based on the information.

3 8. Legal Argument, including authorities:

4 The jury must have analyzed each and every element of attempt murder to
5 conclude that the Appellant was guilty beyond a reasonable doubt. See United
6 States v. Gaudin, 515 U.S. 506, 115 S.Ct 2310, 2319-20 (1995).

7 The Appellant argues that jury Instruction Number 20 is not proper because it
8 misstates and misapplies the law. The Appellant argues that the instruction should
9 contain an intent element to find guilt but the Appellant fails to take all of the
10 instructions as a whole. Instruction 20 reads:

11 Where several parties join together in a common design to commit any
12 unlawful act, each is criminally responsible for the acts of his
13 confederates committed in furtherance of the common design. In
contemplation of law, the act of one is the act of all. (AA p. 22).

14 Nevada adheres to the Pinkerton theory of conspiracy liability which holds that the
15 overt act of one is the act of all even without a specific new agreement, so long as
16 the "partnership in crime" continues. See State v. Wilcox, 105 Nev. 434, 436, 776
17 P.2d 549, 550 (1989); Pinkerton v. United States, 328 U.S. 640, 646-647, 66 S.Ct.
18 1180, 1183-184 (1946); See also Goldsmith v. Sheriff, 85 Nev. 295, 306, 454 P.2d
19 86, 93 (1969). Therefore, in Nevada the acts of one conspirator in furtherance of the
20 conspiracy are the acts of all, and each and every individual will be held criminally
21 responsible for the acts of the other. The instruction is therefore an accurate
22 statement of the law on conspiracy and the instruction given was relevant because
23 the information charged the Appellant with attempt murder with use of a deadly
24 weapon under three theories of criminal responsibility by either:

- 25 (1) directly committing the act;
26 (2) aiding and abetting and/or;
27 (3) conspiring to commit the said offense. (AA p. 5).
28

1 According to NRS 175.161(2), the judge shall give the jury written
2 instructions on all such matters of law that the court thinks necessary for the jury to
3 render a verdict based on the information. Further, under NRS 175.161(3),

4 [E]ither party may present to the court any written charge, and request
5 that it be given. If the court thinks it correct and pertinent, it must be
6 given, if not, it must be refused. Nev. Rev. Stat. Ann. §175.616 (3)
(1992).

7 In the instant case, the judge applied those principles in giving Instruction
8 Number 20 and all the other Instructions based on the information because
9 conspiracy was one of three theories in which the Appellant could be held criminally
10 responsible for the acts of the shooter. The instruction was also pertinent to the
11 jurors' understanding of the charges and was needed by them to render a verdict
12 based on the information .

13 The jury was also charged by Instruction 2:

14 [N]ot to single out any certain sentence or any individual point or
15 instruction and ignore the others, but you are to consider all the
16 instructions as a whole and regard each in light of all the others. (AA p.
4)

17 The Appellant tries to single out one jury instruction without taking into account the
18 other 30 instructions to claim that it is a misstatement of the law. This is in direct
19 opposition to what was instructed by the court to the jurors in the case at bar,
20 because the jury was also instructed to consider all the instructions as a whole and
21 regard each in light of all others. (AA p. 20). Instruction 20 was relevant because it
22 contributed to the jurors' understanding of the information based on the
23 prosecution's third theory of holding the Appellant responsible for the attempted
24 murder, namely, that the Appellant conspired with his cousin Johnny Walker to
25 commit the said offense and was therefore proper under the information charged.
26 Instruction 4 clearly states the elements of attempt murder and reads:

27 The elements of an attempt to commit murder are:
28 1) the intent to commit murder;

2)

1 performance of some act towards its commission; and
2 3) failure to consummate its commission.(AA p. 6).

3 Therefore, the jury was instructed that to convict the Appellant of attempt
4 murder with use of a deadly weapon it must conclude beyond a reasonable doubt
5 that the Appellant had the intent to commit murder.

6 The Nevada Supreme Court held in Sheriff, Clark County v. Potter, 99 Nev.
7 389, 663 P.2d 350 (1983) (citing Merryman v. State, 95 Nev. 648, 650, 601 P.2d
8 53, 53 (1979)):

9 [T]hat presence, companionship, and conduct before and after an
10 offense are circumstances from which a Defendant's participation in
the criminal intent may be inferred.

11 In Merryman, the defendant was the driver of a vehicle that was used to flee
12 the scene of a burglary. 95 Nev. at 649-650, 601 P.2d at 53. The prosecution
13 concluded that the defendant was outside the scene for the purpose of aiding and
14 abetting the co-felon in the escape from the burglary. The court reasoned that "the
15 jury is the sole and exclusive judge of the credibility of witnesses and the weight to
16 be given the evidence." Merryman, 95 Nev. at 650, 601 P.2d at 54. The court further
17 reasoned that:

18 In view of the appellant's presence at the scene, his apparent
19 immediate possession of the stolen property, and the inconsistencies
20 between the testimony of the officer and the appellant, a jury could
21 reasonably conclude that the appellant was parked near the wall for the
purposes of aiding and assisting Barnett in the perpetration of the
burglary, as charged. Id.

22 The same is true in the instant case. The Appellant, prior to the shooting, had
23 smoked marijuana with the victim and at some point during this time lost his gold
24 necklace.(RA pp. 44-56). The Appellant returned on two subsequent occasions to
25 the victim's home to look for the necklace and upon leaving stated to the victim of
26 the attempted murder "I'm not going to go out like no punk." (RA p. 49). Moreover,
27 the Appellant and his cousin Johnny Walker returned to the victim's home some 5-6
28 hours later.(RA p. 56). The Appellant, approaching on foot with Johnny Walker,
who the victim and his friend Josh Martinez did not know and had never met before,

1 inquired about smoking some marijuana.(RA p. 56). After crossing the street to the
2 darkened park, three of the four young men smoked a joint. (RA p. 59). The victim
3 was then grabbed as he outstretched his hand to say goodbye.(RA pp. 60-62). The
4 Appellant's cousin then pulled the victim towards him.(RA pp. 60-62). The victim,
5 seeing a gun near his head, ducked as a shot rang out penetrating his neck.(RA p.
6 63). Two subsequent shots rang out as the victim ran from the scene. (RA p. 65).

7 The Appellant's conduct in the instant case is analogous to that in Merryman,
8 where the defendant's conduct before, and after the burglary was evidence of the
9 defendant's intent to commit the burglary. Here, Appellant's conduct before the
10 shooting, namely, that he had lost his gold necklace, and had stated to the victim
11 that he was "not going out like no punk" are circumstances in which the jury could
12 conclude the intent to commit the murder. The Appellant was also present at the
13 scene of the crime before, during, and after its commission and was a close
14 companion with the shooter, his cousin, Johnny Walker. The Appellant approached
15 the scene with the shooter some 5-6 hours after his comments of "not going out like
16 no punk." Moreover, the Appellant's presence at the scene of the subsequent
17 shooting by the Appellant's cousin is all evidence in which the jury can infer the
18 Appellant's intent to commit murder under Instruction 4.

19 Therefore, the appellant's argument that jury instruction 20 is a misstatement
20 of the law and misapplies the law is misplaced because the instruction must be taken
21 in conjunction with all other 30 instructions. The jury nor the appellant can single
22 out any certain instructions and ignore the rest. (AA p. 4).

23 The jury instructions as a whole set out the necessary elements of law needed
24 for the jury to render a verdict based on the information, including the specific intent
25 to commit murder needed to convict the appellant of attempt murder with a deadly
26 weapon. The jury instruction 20 was a proper statement of the law as it relates to
27 conspiracy and as instructed the jury must and did find that the Appellant had the
28

APP. 092

VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to raise material issues or arguments in the fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 27th day of May 1999.

STEWART L. BELL
Clark County District Attorney

By: 
JAMES TUFEELAND
Nevada Bar #000439
Chief Deputy District Attorney
200 South Third Street
Suite 434
Las Vegas, Nevada 89155
(702) 455-4711

APP. 093

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN D. WALKER,

No. 33637

Appellant,

FILED

vs.

JUN 21 1999

THE STATE OF NEVADA,

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Respondent.

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon. The district court sentenced appellant to two like and consecutive terms of imprisonment for a minimum term of forty-eight (48) months and a maximum term of one hundred twenty (120) months. The court granted appellant credit for four hundred fifty-three (453) days of presentence incarceration and ordered appellant to pay a \$25.00 administrative fee.

Appellant's sole contention is that Jury Instruction 20 allowed the jury to convict appellant of aiding and abetting attempted murder without finding that appellant had the requisite criminal intent. We conclude that appellant's contention lacks merit.

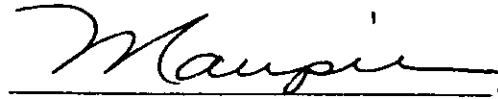
Appellant fails to cite to any relevant portion of the record that shows that he objected to Instruction 20 on the basis now asserted. Moreover, our review of the record reveals that appellant objected to the instruction only on the ground that insufficient evidence had been adduced to show that appellant was criminally liable under the conspiracy theory advanced by the state. Therefore, because appellant failed to object to Instruction 20 on the basis now asserted, appellate review is precluded. See Mercado v. State, 100 Nev. 535, 538

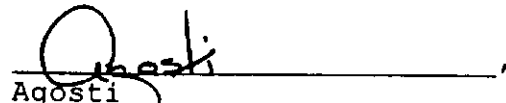
APP. 094

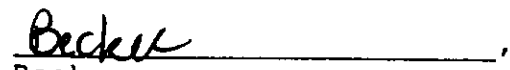
n.4, 688 P.2d 305, 308 n.4 (1984) (claim that aiding and abetting instruction allowed jury to convict defendants without finding any criminal intent will not be considered on appeal where defendants failed to raise "sufficiently particularized" objection to instruction below).

Having concluded that appellant's contention has not been preserved for our review, we

ORDER this appeal dismissed.


Maupin J.


Agosti J.


Becker J.

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
John P. Fadgen
Clark County Clerk

APP. 095

ROUGH DRAFT

3

1 LAS VEGAS, NEVADA; TUESDAY, NOVEMBER 23, 2003

2 9:00 A.M.

3 P R O C E E D I N G S

4 * * * * *

5 THE COURT: Walker page thirteen.

6 MR. COLIN: I'm James Colin here for Mr. Sgro,
7 Judge. How are you?

8 THE COURT: What page is that? Page thirteen.

9 MR. COLIN: Judge, we're here on the state's
10 motion to dismiss the case for procedural time bar. The
11 state Hathaway V state 119, Nevada 30 is directly on
12 point. Christian Walker had a good faith belief that his
13 appeal was being pursued by his direct appellate counsel
14 pursuant to that Hathaway V state case which adopted the
15 Ninth Circuit ruling in Loveland V Hatcher.

16 Your Honor should grant Mr. Walker an evidentiary
17 hearing so that he can present the facts of his case and
18 perhaps establish good cause for the failure to file the
19 petition in one year. And I'm submit it on that, Judge.

20 MS. KOLLINS: Judge, and I think it's clear that
21 this case was procedurally barred, both between the time
22 the appeal was denied by the Nevada Supreme Court and
23 Mr. Fadgett's --

24 THE COURT: Death.

APP. 096

ROUGH DRAFT

4

1 MS. KOLLINS: -- death. And then also subsequent
2 thereto when Mr. Sgro took over the matter in August 2001,
3 here we are September 2003. So on both ends, I mean,
4 they're way out of time.

5 THE COURT: Well, they're out of time, but they
6 also allege good grounds for the time bar.

7 MS. KOLLINS: I understand, Judge.

8 THE COURT: But I find good grounds do not exist
9 for the procedure default, and, therefore, the procedural
10 default means the petition has to be dismissed. Thank
11 you.

12 MR. COLIN: Judge, even pursuant to Hathaway V
13 state?

14 THE COURT: Yes.

15 MR. COLIN: Where you're supposed to get an
16 evidentiary hearing to show your good grounds.

17 THE COURT: Yes.

18 MR. COLIN: Could I ask what separates this case
19 from the factual situation in Hathaway?

20 THE COURT: The state distinguished that in their
21 points and authorities, and I rely upon them.

22 MR. COLIN: Thanks, Judge.

23 THE COURT CLERK: So the state's motion to
24 dismiss is granted, and the defendant's petition for writ

APP. 097

ROUGH DRAFT

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1 of habeas corpus is denied.

2 State to prepare?

3 THE COURT: Okay.

4 (WHEREUPON, THE PROCEEDINGS
5 WERE ADJOURNED)

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ROUGH DRAFT

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REPORTER'S CERTIFICATE

STATE OF NEVADA)
 : SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED COURT REPORTER, HEREBY
CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE
PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME
AND PLACE INDICATED.

THAT THEREAFTER SAID STENOGRAPHY NOTES WERE
TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY SUPERVISION.

THAT THE FOREGOING TRANSCRIPT CONSTITUTES AN
UNCERTIFIED ROUGH DRAFT TRANSCRIPTION OF MY STENOGRAPHY
NOTES OF SAID PROCEEDINGS.

THAT THIS TRANSCRIPT HAS NOT BEEN EDITED,
PROOFREAD, FINALIZED, INDEXED OR CERTIFIED.

IN WITNESS WHEREOF, I HEREUNTO SUBSCRIBE MY NAME
AT LAS VEGAS, NEVADA.



PEGGY ISOM, RMR, CCR NO. 541

APP. 099

1 ANTHONY P. SGRO, ESQ.
Nevada Bar No. 3811
2 JAMES A. COLIN, ESQ.
Nevada Bar No. 6257
3 PATTI & SGRO
300 East Charleston Blvd., Suite 105
4 Las Vegas, Nevada 89104
Attorney for Appellant
5 CHRISTIAN D. WALKER

6
7 **IN THE SUPREME COURT**
8 **OF THE STATE OF NEVADA**

FILED

DEC 18 2003

9 * * *

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY DEPUTY CLERK

10 CHRISTIAN D. WALKER,
11 Appellant

SUPREME COURT CASE NO. **42292**

12 vs.

13 THE STATE OF NEVADA,
14 Respondent.

POST-CONVICTION APPEAL OF
CLARK COUNTY DISTRICT COURT
CASE NO. C146419

15
16 **FAST TRACK STATEMENT**

17
18 COMES NOW Appellant CHRISTIAN D. WALKER by and through his attorneys,
19 PATTI & SGRO, and for his Fast Track Statement submits the following:

- 20 1. Name of party filing this fast track statement: CHRISTIAN D. WALKER
21 2. Name, law firm, address, and telephone number of attorney submitting this fast
22 track statement:

23 Anthony P. Sgro
PATTI & SGRO
24 300 E. Charleston Blvd., Suite 105
Las Vegas, Nevada 89104
25 (702) 385-9595

- 26 3. Name, law firm, address, and phone number of appellate counsel if different from
27 trial counsel: Same as above.

28
RECEIVED

DEC 18 2003

CLERK OF SUPREME COURT
By DEPUTY CLERK

APP. 100

- 1 4. **Judicial district, county, and district court docket number of lower court**
- 2 **proceedings:** Eighth Judicial District, Clark County, District Court, Case No. C146419,
- 3 Department XVI.
- 4 5. **Name of judge issuing decision or order appealed from:** Judge John S. McGroarty.
- 5 6. **Length of trial:** Three (3) Days.
- 6 7. **Convictions appealed from:** Attempted Murder with use of a deadly weapon.
- 7 8. **Sentence for each count:**
- 8 Attempted Murder: MINIMUM: FOUR (4) YEARS,
- 9 MAXIMUM: TEN (10) YEARS.
- 10 *consecutive* with weapons enhancement of:
- 11 With Use of a Deadly Weapon: MINIMUM: FOUR (4) YEARS,
- 12 MAXIMUM: TEN (10) YEARS.
- 13 9. **Date district court announced decision, sentence, or order appealed from:**
- 14 September 23, 2003.
- 15 10. **Date of entry of written judgment or order appealed from:** October 6, 2003.
- 16 11. **If this appeal is from an order granting or denying a petition for a writ of habeas**
- 17 **corpus, indicate the date written notice of entry of judgment or order was served by the**
- 18 **court:** October 20, 2003.
- 19 12. **If the time for filing the notice of appeal was tolled by a post-judgment motion,**
- 20 **(a) specify the type of motion, and the date of filing of the motion:** N/A
- 21 13. **Date notice of appeal filed:** October 28, 2003.
- 22 14. **Specify statute or rule governing the time limit for filing the notice of**
- 23 **appeal, e.g., N.R.S. 34.575, N.R.S. 177.015, or other:** N.R.S. 34.575.
- 24 15. **Specify statute, rule or other authority which grants this court jurisdiction to review**
- 25 **the judgment or order appealed from:** NRS 34.575.
- 26 16. **Specify the nature of the disposition below:** District Court DISMISSAL [due
- 27 **to procedural time-bar] of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).**
- 28 17. **Pending and prior proceedings in this court:** N/A.
18. **Pending and prior proceedings in other courts:** N/A.

APP. 101

1 19. **Proceedings raising same issues:** Hathaway v. State, 119 Nev. 30, 71 P.3d 503 (2003).

2 20. **Procedural History:**

3 CHRISTIAN D. WALKER (hereinafter referred to as WALKER), was charged by way of
4 Information on October 29, 1997 with Attempted Murder with use of a deadly weapon, and
5 Battery with use of a deadly weapon. (APP¹, pp. 1-4). On November 2, 1998, the trial of
6 Christian WALKER began. After a three day trial by jury in the Eighth Judicial District Court, on
7 November 5, 1998, Christian WALKER was found guilty of Attempted Murder with use of a
8 deadly weapon, and was later sentenced to a minimum of 48 months and a maximum of 120
9 months, with equal and consecutive 48 month minimum, 120 month maximum for use of a deadly
10 weapon. (APP, pp. 5-6).

11 A Notice of Appeal for the direct appeal was filed on January 20, 1999, and a Fast Track
12 statement which only alleged one (1) appellate issue was then filed with the Nevada Supreme
13 Court by trial counsel John Fadgen, Esq. on May 17, 1999. Only one (1) issue was alleged in this
14 direct appeal despite Mr. WALKER's expressed desire to trial counsel that additional grounds,
15 including juror misconduct, be argued to the Nevada Supreme Court. A Fast Track response was
16 filed by the State on May 28, 1999 and the Fast Track appeal was then dismissed by the Nevada
17 Supreme Court on June 21, 1999 because the one (1) argued issue was held not properly
18 preserved for appeal by objection at trial.

19 Appellant was never informed by counsel John Fadgen, Esq. that the Fast Track appeal
20 had been dismissed, and Appellant WALKER believed the case to be still ongoing and pending
21 before the Nevada Supreme Court almost two (2) years later when Mr. Fadgen died in March
22 2001. Indeed, it was asserted in the instant Petition for Writ of Habeas Corpus (Post-Conviction)
23 (APP, pp. 11-25) that Mr. Fadgen actually told Mr. WALKER that the appeal was still pending
24 *after* it had actually been dismissed by the Supreme Court. Additional, relevant, and substantial
25 evidence exists to support this serious contention (and all others in this case), but such evidence
26 has not yet been presented in Court because the Honorable District Court Judge John S.
27

28 ¹APP refers to the JOINT APPENDIX for the instant case.

APP. 102

1 McGroarty dismissed the instant Petition on September 23, 2003 without even allowing an
2 evidentiary hearing. (APP, pp. 69-72).

3
4 The undersigned had been appointed by the same Honorable Judge McGroarty on August
5 13, 2001 to investigate and appeal the post-conviction issues in this case. (APP, p. 10). Then,
6 after important Nevada and 9th Circuit constitutional caselaw developed, any accompanying delay
7 of no prejudice to the State and no fault of the Petitioner, the instant Petition along with Points
8 and Authorities was filed on July 14, 2003. (APP, pp. 11-52). At the scheduled hearing on July
9 28, 2003, the State requested a continuance which was granted by the Judge, and the State then
10 filed a Motion to Dismiss the Defendant's Petition on grounds of a procedural time-bar. (APP,
11 pp. 53-59). WALKER filed an Opposition to the State's motion, and the Judge heard oral
12 argument on Sept. 23, 2003, summarily dismissing the Petition due to procedural time-bar. (APP,
13 pp. 69-72). WALKER filed the instant Notice of Appeal on October 28, 2003 (APP, pp. 74-75),
14 and this FAST TRACK STATEMENT follows.

15 21. **Facts:**

16 The factual circumstances which first led to the criminal charges against Appellant
17 WALKER are of little consequence to this instant appeal, as Appellant WALKER's post-
18 conviction Habeas Petition was summarily dismissed by the District Court Judge *without* an
19 evidentiary hearing on procedural grounds alone. (APP, pp. 69-72). Consequently, this appeal
20 simply requests what Justice currently demands: An evidentiary hearing where the appropriate
21 testimony and evidence can be presented to prove Mr. WALKER's case, and entitlement to be
22 heard. Once again, there has never been any consideration of the merits of the instant Petition,
23 and Justice demands such consideration. See ARGUMENT, 23, infra.

24 The facts of actual importance in *this* appeal concern the various dates and circumstances
25 surrounding the filing, timing, and resolution of various legal documents, primarily the filing of the
26 instant Petition more than one year after the Remittitur on the direct appeal was issued by this
27 Court. (APP, p. 9). It must be noted here, up front, in the facts, that any delay beyond one (1)
28 year in filing here caused absolutely no prejudice to the State in this particular case. There is no

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1 presumption of prejudice to the State until five (5) years have passed, NRS 34.800(2), which has
2 not happened here, and under our unique facts, it is provably clear that, to this very day, the State
3 still would not be prejudiced if Mr. WALKER's conviction is ultimately set aside, and a new trial
4 was desired. However, again, the defense has been unable to prove these many essential and
5 relevant facts because no evidentiary hearing was allowed by the Judge.

6 If the Honorable Supreme Court Justices deem the underlying facts of this case useful,
7 relevant, or helpful the facts are fully presented in the Points and Authorities in support of the
8 Petition itself which has been included as a part of the Joint Appendix for the instant case. (APP,
9 pp. 28-29).

10 **FACTS of relevance to the instant appeal:**

11 After WALKER was convicted of Attempted Murder with a Deadly Weapon on
12 November 5, 1998, a Notice of Appeal for the direct appeal was filed on January 20, 1999, and a
13 Fast Track statement was filed by trial counsel John Fadgen, Esq. on May 17, 1999. The Fast
14 Track appeal did not contain the appropriate issues, including issues demanded to be argued by
15 WALKER. This inadequate Fast Track appeal was then dismissed by the Nevada Supreme Court
16 on June 21, 1999, and a Remittitur was issued by this Court on July 19, 1999. (APP, p. 9).

17 Appellant WALKER has always contended and still contends that he was never informed
18 by counsel John Fadgen, Esq. that the Fast Track appeal had been dismissed. Indeed, when
19 allowed, WALKER will claim, testify, and prove that he was blatantly and expressly told by
20 Fadgen that the appeal was still pending *after* it had actually been dismissed by the Supreme
21 Court. As a consequence, Appellant WALKER still believed the case to be ongoing and pending
22 before the Nevada Supreme Court almost *two* (2) full years after it had, in reality, been dismissed.
23 WALKER only suspected the truth when Mr. Fadgen died in March 2001. He did not learn of
24 the actual disposition of his appeal until Patti & Sgro informed him of its dismissal on or about
25 May 2001, almost two (2) years after it had been dismissed. Again, these contentions were first
26 asserted in the instant Petition for Writ of Habeas Corpus (Post-Conviction) (APP, pp. 11-25),
27 but have yet to be adequately aired or proven, because no evidence or testimony was ever allowed
28 to be presented by the District Court Judge. Instead, the Judge summarily dismissed the Petition

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without an evidentiary hearing, and, thereby, committed reversible error.

1 After Mr. Fadgen's death, the undersigned was contacted by Appellant WALKER
2 concerning WALKER's case status and available remedies, if any. After the undersigned learned
3 the true nature of WALKER's case status and informed Mr. WALKER of its implications, the
4 undersigned then asked the Honorable Judge McGroarty that he be appointed to represent Mr.
5 WALKER in this complicated post-conviction appeal. The Judge granted the request, and
6 appointed the undersigned on August 13, 2001 to investigate and appeal the post-conviction
7 issues in this case. (APP, p. 10). This appointment of counsel took place more than two (2)
8 years after the Remittitur had been issued following dismissal of the direct appeal. Finally, after a
9 reasonable, necessary, and fruitful delay by counsel spent researching, writing, and awaiting
10 important Nevada and 9th Circuit constitutional caselaw to develop, including, inter alia, Sharma
11 v. State, 56 P.3d 868 (Nevada, Oct. 31, 2002), and Hathaway v. State, 119 Nev. 30, 71 P.3d 503
12 (2003), the instant Petition for Writ of Habeas Corpus (Post-Conviction) was filed on July 14,
13 2003.

14 At the initial scheduled hearing for the Petition on July 28, 2003, the State requested a
15 continuance which was granted by the Judge, and the State then filed a Motion to Dismiss the
16 Defendant's Petition on grounds of procedural time-bar, because the Petition was filed more than
17 one (1) year after the Remittitur was issued from the direct appeal. WALKER filed an Opposition
18 to the State's motion, citing Hathaway, and the Judge heard oral argument on Sept. 23, 2003.
19 The Judge summarily dismissed the Petition due to procedural time-bar. (APP, pp. 69-72). No
20 evidentiary hearing was ever allowed. This appeal follows, respectfully requesting that the
21 Nevada Supreme Court remand the proceedings back to District Court and order the evidentiary
22 hearing that should have been granted by the District Court Judge.

22. **Issue on Appeal:**

23 **Whether the District Court's summary dismissal of WALKER's Petition**
24 **for Writ of Habeas Corpus (Post-Conviction) due to a procedural time**
25 **bar, without an evidentiary hearing, was REVERSIBLE ERROR**
26 **because CHRISTIAN D. WALKER was entitled to an evidentiary**
27 **hearing pursuant to Hathaway v. State, 119 Nev. 30, 71 P.3d 503 (2003).**
28

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1 23. **Legal Argument, including authorities:**

2 After dismissal of the direct appeal in this case, the Remittitur from the Nevada Supreme
3 Court was issued on July 19, 1999. The Petition for Writ of Habeas Corpus (Post-Conviction)
4 was ultimately filed on July 14, 2003, more than three (3) years after the Remittitur, and beyond
5 the one-year time limit for filing a post-conviction Habeas Petition. NRS 34.726. However, this
6 statutorily defined one-year time limit may be excused by a showing of good cause and prejudice.
7 NRS 34.726(1). In the instant case, it can be proven that such good cause and prejudice exists.
8 The recent Nevada Supreme Court case Hathaway v. State, 119 Nev. 30, 71 P.3d 503 (June 26,
9 2003), is directly on point and controlling. Here, Petitioner Christian WALKER honestly and
10 reasonably believed in good faith that his direct appeal was still being pursued and remained
11 pending with the Nevada Supreme Court when his attorney John Fadgen died in March 2001.
12 Evidence to support and prove this assertion can be presented at an evidentiary hearing, a hearing
13 denied by the District Court. Indeed, it will be proven that sometime in 2000, *after* dismissal of
14 the appeal, Mr. Fadgen affirmatively *told* Mr. WALKER that the appeal was still pending, and the
15 Nevada Supreme Court had not yet rendered a decision. (APP, pp. 20-22). Under these
16 circumstances, pursuant to Hathaway v. State, Appellant WALKER is entitled to an evidentiary
17 hearing in District Court where he may prove good cause and prejudice which excuses the "late"
18 filing of his Petition. Hathaway v. State, 71 P.3d at 508.

19 Appellant's claims are not belied by the record and, if true, entitle him to relief. Id.
20 Again, it will be proven that not until after defense counsel Fadgen's death in 2001 did Mr.
21 WALKER finally suspect that his appeal had, in fact, already been dismissed. Indeed, until that
22 time he honestly and reasonably believed the case was still pending. WALKER only learned the
23 case had actually been dismissed back in June, 1999 when ultimately informed of that fact around
24 May 2001 by the undersigned. Thus, the essential facts in the instant case are remarkably similar
25 to the facts in Hathaway, where a similar delay was held to be good cause to excuse late filing of
26 the Petition. Hathaway v. State, 71 P.3d at 503.

27 This Court in Hathaway held that a Petitioner can establish good cause for the delay in
28 filing under NRS 34.726(1) if the Petitioner establishes (1) he actually and reasonably believed his

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1 counsel was pursuing his direct appeal, and (2) that the petitioner filed his habeas corpus petition
2 within a reasonable time after he should have known that his counsel was not pursuing his direct
3 appeal. Hathaway v. State, 71 P.3d at 507-508. Again, at an evidentiary hearing, WALKER can
4 testify and prove that he honestly believed his appeal was being pursued and was still pending at
5 the time of Mr. Fadgen's death in 2001. This is because Mr. Fadgen expressly *told* WALKER in
6 2000 that the appeal was still pending and he was still pursuing the appeal on WALKER's behalf.
7 Exactly as this Court and the Ninth Circuit Court of Appeals recognized: "if a defendant
8 reasonably believes that his counsel is pursuing his direct appeal he most naturally will not file his
9 own post-conviction petition." Hathaway v. State, 71 P.3d at 507; Loveland v. Hatcher, 231
10 F.3d 640 (9th Cir. 2000). This assertion in 2000 by defense counsel Fadgen, if proven, clearly
11 makes WALKER's belief objectively reasonable, and satisfies the first prong of the Hathaway
12 test.

13 Likewise, the second prong of the Hathaway test can be satisfied if testimony can be
14 presented at an evidentiary hearing in District Court. At this hearing, it can be proven that
15 Appellant WALKER and his post-conviction counsel acted in a prompt, reasonable, and
16 appropriate manner in filing the instant Petition. First, in 2001, after defense counsel Fadgen's
17 death, Mr. WALKER promptly contacted the undersigned to protect his rights and confirm the
18 status of his appeals. The Honorable District Court Judge then properly appointed the
19 undersigned in August, 2001 to investigate and pursue all post-conviction remedies in this case.
20 Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Defense counsel vigorously investigated
21 and pursued this matter, and then filed the instant Petition in July, 2003 after vital and controlling
22 Nevada and 9th Circuit caselaw had developed. See e.g. Sharma v. State, 56 P.3d 868 (Nevada)
23 (a conviction for Attempted Murder under an aider and abettor theory requires proof that the
24 defendant had a specific intent to kill). WALKER should certainly not be penalized for any delay
25 deemed by counsel necessary to protect his rights. Any such delay was not his fault. Bennett v.
26 State, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995); U.S.C.A. Const. Amend. 4, 5, 6, 14.

27 Finally, it can be proven that the State is not prejudiced in any way by the filing delay here.
28 There is *not* a presumption of prejudice to the State until five (5) years have passed, and even

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1 including any delay by counsel, less than four (4) years have passed here, similar to the filing delay
2 of three (3) years in Hathaway. NRS 34.800(2). Indeed, it will be shown that there is no
3 prejudice at all to the State under the specific facts and circumstances of this case, and a retrial
4 comporting with Nevada law could easily be held. U.S.C.A. Const. Amend. 4, 5, 6, 8, 14;
5 Nevada Constitution; NRS 34.800(1). Thus, under the unique factual circumstances of this case,
6 it can be proven that WALKER filed the instant post-conviction Habeas Corpus petition in a
7 reasonable time after he learned his appeal had been dismissed. Hathaway v. State, 71 P.3d at
8 508. Thus, the second Hathaway prong can be satisfied, and because WALKER has raised claims
9 supported by specific facts not belied by the record entitling him to relief, an evidentiary hearing
10 must be held to, inter alia, determine whether the asserted good cause exists to excuse the delay in
11 filing WALKER's petition. Hathaway v. State, 71 P.3d at 508.

INEFFECTIVE ASSISTANCE

13 Likewise, in addition to the above controlling Nevada law, errors by defense counsel that
14 rise to the level of ineffective assistance establish cause and prejudice to excuse any default under
15 NRS 34.726 and NRS 34.810(1)(b). Coleman v. Thompson, 501 U.S. 722, 753-54, 111 S.Ct.
16 2546, 2566-67 (1991); Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); Stewart v.
17 Warden, 92 Nev. 588, 589, 555 P.2d 218, 219 (1976). Here, defense counsel's conduct on direct
18 appeal constituted ineffective assistance and provides additional "good cause" to excuse default
19 under these circumstances. Crump v. Warden, 113 Nev. at 293; Stewart v. Warden, 92 Nev. at
20 588. Any delay in filing was not the fault of Petitioner because defense counsel's misinformation
21 constituted ineffective assistance under Strickland, and dismissal of this Petition as untimely will
22 unduly prejudice WALKER. NRS 34.726. Also, because of defense counsel's misinformation,
23 WALKER's claim of ineffective assistance by defense counsel was not reasonably available
24 during the one-year statutory time period. Hathaway v. State, 71 P.3d at 506. Thus, WALKER's
25 delay in filing must be excused, and WALKER is entitled to an evidentiary hearing to prove this
26
27
28

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1 right to relief. U.S.C.A. Const. Amend, 4, 5, 6, 14; Hathaway v. State, 71 P.3d 506.

2 24. **Preservation of issues:**

3
4 Denial or Dismissal of a Petition for Writ of Habeas Corpus (Post-Conviction) on
5 procedural grounds is appealable to the Nevada Supreme Court pursuant to NRS 34.575.

6 25. **Does this appeal present a substantial legal issue of first impression in this**
7 **jurisdiction or one affecting an important public interest? No. If so, explain: N/A.**

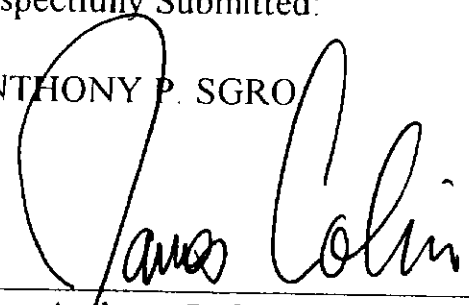
8
9 **CONCLUSION**

10 **WHEREFORE**, based upon the foregoing reasons, and pursuant to the United States
11 Constitution and the Nevada Constitution, Nevada laws, and Nevada cases, including Hathaway
12 v. State, 119 Nev. 30, Appellant WALKER respectfully requests this Honorable Court remand
13 this proceeding back to the District Court for an evidentiary hearing on all issues presented in the
14 Petition for Writ of Habeas Corpus (Post-Conviction) so that this Post-Conviction appeal can be
15 properly heard and decided *on the merits*, in accordance with law. Nevada Constitution;
16 U.S.C.A. Const. Amend. 4, 5, 6, 14.

17
18 **DATED** this 15th day of December, 2003.

19
20 Respectfully Submitted:

21 ANTHONY P. SGRO

22
23 By 

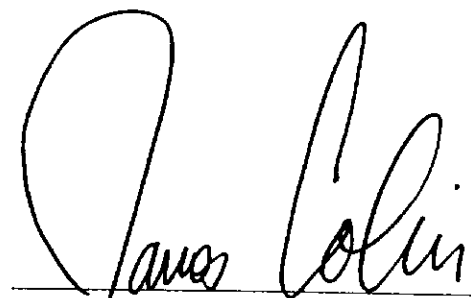
24 Anthony P. Sgro, Esq.
25 Nevada Bar No. 003811
26 James A. Colin, Esq.
27 Nevada Bar No. 006257
28 **PATTI & SGRO**
300 E. Charleston Blvd., Suite 105
Las Vegas, Nevada 89104
(702) 385-9595

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VERIFICATION

I recognize that pursuant to N.R.A.P. 3(c) I am responsible for filing a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 15th day of December, 2003.



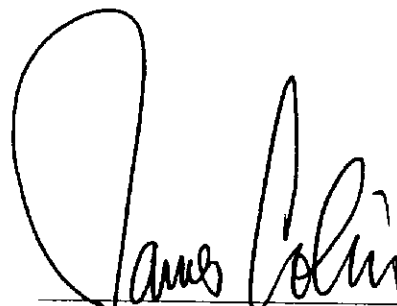
Anthony P. Sgro, Esq.
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Nevada Bar No. 006257
PATTI & SGRO
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Las Vegas, Nevada 89104
(702) 385-9595

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 15th day of December, 2003, I mailed a copy of the foregoing FAST TRACK STATEMENT (Walker v. State), by depositing a copy thereof, in the United States Mail, in Las Vegas, Nevada, postage pre-paid, addressed to:

JAMES TUFTELAND
District Attorney's Office
200 South Third St.
Las Vegas, Nevada 89101

A handwritten signature in black ink, appearing to read "James TufteLand", written over a horizontal line.

an employee of Patti & Sgro

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ANTHONY P. SGRO, ESQ.
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JAMES A. COLIN, ESQ.
Nevada Bar No. 6257
PATTI & SGRO
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Las Vegas, Nevada 89104
Attorney for Appellant
CHRISTIAN D. WALKER

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

* * *

CHRISTIAN D. WALKER,

Appellant

vs.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT CASE NO. **42292**

*POST-CONVICTION APPEAL OF
CLARK COUNTY DISTRICT COURT
CASE NO. C146419*

FILED

DEC 18 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY _____
DEPUTY CLERK

JOINT APPENDIX

for

FAST TRACK STATEMENT

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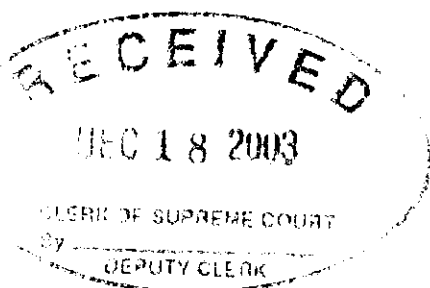
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Counsel for Appellant

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Carson City, Nevada 89710

Counsel for Respondent



APP. 112

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Attorney for Appellant
CHRISTIAN D. WALKER

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

* * *

CHRISTIAN D. WALKER,
Appellant

vs.

THE STATE OF NEVADA,
Respondent.

SUPREME COURT CASE NO. **42292**

*POST-CONVICTION APPEAL OF
CLARK COUNTY DISTRICT COURT
CASE NO. C146419*

JOINT APPENDIX
for

FAST TRACK STATEMENT

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Counsel for Respondent

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1 INFO
 2 STEWART L. BELL
 3 DISTRICT ATTORNEY
 4 Nevada Bar #000477
 5 200 S. Third Street
 6 Las Vegas, Nevada 89155
 7 (702) 455-4711
 8 Attorney for Plaintiff

9 I.A. 11-12-97
 10 9:00 A.M.
 11 PD/Fadgen

DISTRICT COURT
 CLARK COUNTY, NEVADA

✓ filed
 10/29/97

8:45 AM
 Loretta Bowman
 Clerk

✓ 8 THE STATE OF NEVADA,
 9
 10 Plaintiff,

-vs-

11 ~~JOHNNY HUGHES WALKER, JR. #1421028,~~
 12 ~~CHRISTIAN D. WALKER #1507623~~

Defendants.

✓ Case No. C 146419
 ✓ Dept. No. XVI
 ✓ Docket U

✓ INFORMATION

✓ 15 STATE OF NEVADA }
 16 COUNTY OF CLARK } ss:

17 STEWART L. BELL, District Attorney within and for the County of Clark, State of
 18 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

19 That ~~w~~, the Defendant(s) above named, having committed the crimes of ATTEMPT
 20 MURDER WITH USE OF A DEADLY WEAPON (Felony-NRS 200.010, 200.030, 193.330,
 21 193.165) and BATTERY WITH USE OF A DEADLY WEAPON (Felony-NRS 200.481),
 22 on or about the 22nd day of September, 1997, within the County of Clark, State of Nevada,
 23 contrary to the form, force and effect of statutes in such cases made and provided, and against
 24 the peace and dignity of the State of Nevada,

25 COUNT I - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

26 did then and there, without authority of law and malice aforethought, wilfully and
 27 feloniously attempt to kill DAVID DIMAS, a human being, by shooting at and into the body of
 28 the said DAVID DIMAS, with a deadly weapon, to-wit: a firearm; defendants aiding or abetting

1

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1 each other in the commission of the crime by accompanying each other the crime scene where
 2 ~~defendant~~ CHRISTIAN D. WALKER lured DAVID DIMAS to an area where ~~defendant~~
 3 JOHNNY HUGHES WALKER, JR., displayed a firearm and shot DAVID DIMAS; the
 4 ^{and Johnny Walker} defendants acting in concert throughout; the ^{VJW} defendants acting as lookouts for each other and
 5 ^{VJW} the defendants leaving the crime scene together, whereby ^{the} each defendant is responsible under
 6 one or more of the following principles of criminal liability, to-wit: (1) by having directly
 7 committed said offense; (2) by aiding or abetting each other by acting in concert in its
 8 commission; and/or (3) by conspiring with each other to commit said offense whereby each is
 9 vicariously liable for the acts of the other in furtherance of the conspiracy in its commission.

10 COUNT II - BATTERY WITH USE OF A DEADLY WEAPON

11 did then and there wilfully, unlawfully, and feloniously use force or violence upon the
 12 person of another, to-wit: DAVID DIMAS, with use of a deadly weapon, to-wit: a firearm, by
 13 shooting at and into the body of the said DAVID DIMAS, with said firearm; ^{and JW} defendant aiding
 14 or abetting each other in the commission of the crime by accompanying each other to the crime
 15 scene where ~~defendant~~ CHRISTIAN D. WALKER lured DAVID DIMAS to an area where
 16 ~~defendant~~ JOHNNY HUGHES WALKER, JR., displayed a firearm and shot DAVID DIMAS;
 17 ^{VJW} the defendants acting in concert throughout; the ^{VJW} defendants acting as lookouts for each other and
 18 ^{VJW} the defendants leaving the crime scene together; whereby, ^{the} each defendant is responsible under
 19 one or more of the following principles of criminal liability, to-wit: (1) by having directly
 20 committed said offense; (2) by aiding or abetting each other by acting in concert in its
 21 commission; and/or (3) by conspiring with each other to commit said offense whereby each is
 22 vicariously liable for the acts of the other in furtherance of the conspiracy in its commission

23 ✓ STEWART L. BELL
 24 ✓ DISTRICT ATTORNEY
 Nevada Bar #000477

25
 26 BY 
 27 ✓ MICHAEL N. O'CALLAGHAN
 28 ✓ Deputy District Attorney
 Nevada Bar #000046

to which the Deft. has pled -2-NG

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1 Names of witnesses known to the District Attorney's Office at the time of filing this
2 Information are as follows:

3	<u>NAME</u>	<u>ADDRESS</u>
4	CHAVEZ, RAYNA	4921 Newton Dr. Las Vegas, Nv. 89120
5		
6	CUSTODIAN OF RECORDS	Horizon South High School
7	CUSTODIAN OF RECORDS	Mercy Ambulance
8	GWINN, DR. BYRON	4333 Las Vegas Blvd. No. Las Vegas, Nv. 89115
9		
10	CUSTODIAN OF RECORDS	University Medical Center 1800 W. Charleston Blvd. Las Vegas, Nv.
11		
12	DIMAS, DAVID	4921 Newton Dr. Las Vegas, Nv. 89120
13		
14	DOUZAT, BRANDON	4897 Newton Dr. Las Vegas, Nv. 89120
15		
16	FORD, DANIEL	LVMPD P#4244
17	FOSTER, LAWRENCE	LVMPD P#3541
18	FULLER, MISTY	4780 Fairfax Ave. Las Vegas, Nv. 89120
19		
20	HERNANDEZ, ALBERTO	4641 Conrad Circle Las Vegas, Nv. 89121
21		
22	HERNANDEZ, LIONEL	4641 Conrad Circle Las Vegas, Nv. 89121
23		
24	KING, GREGORY	LVMPD P#1519
25	MIKOLAINIS, JOHN	LVMPD P#1511
26	RODRIGUEZ, KIMMIE	4897 Newton Dr. Las Vegas, Nv. 89120
27		
28	///	

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	<u>NAME</u>	<u>ADDRESS</u>
1		
2	TREMEL, DONALD	LVMPD P#2038
3		
4		
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	LVMPD EV#9709222319	
27	Att MWDW/BWDW-F	
	(TK6)	
28	p:\wpdocs\inf\71455701\rmf	

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16

1 JOC
 2 STEWART L. BELL
 3 DISTRICT ATTORNEY
 Nevada Bar #000477
 4 200 S. Third Street
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 (702) 455-4711
 Attorney for Plaintiff

Shirley B. Ruggins
 JAN 19 8 10 AM '99

FILED

DISTRICT COURT
 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 CHRISTIAN D. WALKER,
 #1507623

13 Defendant.

Case No. C146419B
 Dept. No. XVI
 Docket U

15 JUDGMENT OF CONVICTION (JURY TRIAL)

16 WHEREAS, on the 12th day of November, 1997, the Defendant CHRISTIAN D.
 17 WALKER, entered a plea of not guilty to the crimes of COUNT I - MURDER WITH USE OF
 18 A DEADLY WEAPON (Open Murder) (Felony) and COUNT III - VIOLATION OF
 19 TEMPORARY CUSTODY ORDER (Gross Misdemeanor), committed on the 22nd day of
 20 September, 1997, in violation of NRS 200.010, 200.030, 193.165, 200.591, and the matter
 21 having been tried before a jury, and the Defendant being represented by counsel and having been
 22 found guilty of the crime of ATTEMPT MURDER WITH USE OF A DEADLY WEAPON
 23 (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); and

24 WHEREAS, thereafter, on the 5th day of January, 1999, the Defendant being present in
 25 Court with his counsel JOHN P. FADGEN, Esq., and LISA LUZAICH, Deputy District
 26 Attorney also being present; the above entitled Court did adjudge Defendant guilty thereof by
 27 reason of said trial and verdict and, in addition to the \$25.00 Administrative Assessment Fee,
 28 sentenced Defendant to a minimum term of Forty-Eight (48) months and a maximum term of

CE35

CE31

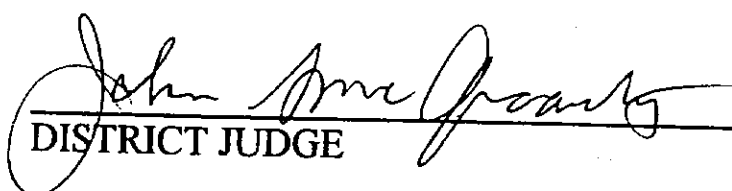
5

APP. 119

1 One Hundred Twenty (120) months in the Nevada Department of Prisons for Attempt Murder,
2 with an equal and consecutive sentence of Forty-Eight (48) months to One Hundred Twenty
3 (120) months for the enhancement of With Use of a Deadly Weapon. The Defendant is granted
4 453 days credit for time served

5 THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this
6 Judgment of Conviction as part of the record in the above entitled matter.

7 DATED this 14th day of January, 1999, in the City of Las Vegas, County of Clark,
8 State of Nevada.

9
10
11 
DISTRICT JUDGE *re*

12
13
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21
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23
24
25
26
27 DA#97-146419B/msr
LVMPD EV#9709222319
28 ATTMURD W/W - F
(TK 6)

APP: 120

16

1 JOC
 2 STEWART L. BELL
 3 DISTRICT ATTORNEY
 4 Nevada Bar #000477
 5 200 S. Third Street
 6 Las Vegas, Nevada 89155
 7 (702) 455-4711
 8 Attorney for Plaintiff

FILED

MAY 21 10 50 AM '99

Shirley B. Rungius
 CLERK

DISTRICT COURT
 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
 9
 10 Plaintiff,

-vs-

11 CHRISTIAN D. WALKER,
 12 #1507623

13 Defendant.

Case No. C146419B
 Dept. No. XVI
 Docket U

15 AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)

16 WHEREAS, on the 12th day of November, 1997, the Defendant CHRISTIAN D.
 17 WALKER, entered a plea of not guilty to the crimes of COUNT I - ATTEMPT MURDER
 18 WITH USE OF A DEADLY WEAPON (Felony) and COUNT II - BATTERY WITH USE OF
 19 A DEADLY WEAPON (Felony), committed on the 22nd day of September, 1997, in violation
 20 of NRS 200.010, 200.030, 193.165, 200.591, and the matter having been tried before a jury, and
 21 the Defendant being represented by counsel and having been found guilty of the crime of
 22 ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS
 23 200.010, 200.030, 193.330, 193.165); and

24 WHEREAS, thereafter, on the 5th day of January, 1999, the Defendant being present in
 25 Court with his counsel JOHN P. FADGEN, Esq., and LISA LUZAICH, Deputy District
 26 Attorney also being present; the above entitled Court did adjudge Defendant guilty thereof by
 27 reason of said trial and verdict and, in addition to the \$25.00 Administrative Assessment Fee,
 28 sentenced Defendant to a minimum term of Forty-Eight (48) months and a maximum term of

CE-05

MAY 24 1999

CE43

7

APP. 121

1 One Hundred Twenty (120) months in the Nevada Department of Prisons for Attempt Murder,
2 with an equal and consecutive sentence of Forty-Eight (48) months to One Hundred Twenty
3 (120) months for the enhancement of With Use of a Deadly Weapon. The Defendant is granted
4 453 days credit for time served

5 THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this
6 Judgment of Conviction as part of the record in the above entitled matter.

7 DATED this 29th day of May, 1999, in the City of Las Vegas, County of Clark, State
8 of Nevada.

9
10
11 
DISTRICT JUDGE
12
13
14
15
16
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18
19
20
21
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DA#97-146419B/msr
LVMPD EV#9709222319
ATTMURD W/W - F
(TK 6)

APP. 122

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN D. WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 33637

District Court Case No. C146419

REMITTITUR

TO: Honorable Shirley Parraguirre, Clark County Clerk

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

Certified copy of Judgment and copy of Order.

Receipt for Remittitur.

DATE: July 19, 1999

Janette Bloom, Clerk of Court

By: J. Inoop

Chief Deputy Clerk

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
John P. Fadgen

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on 7-27-99.

NORRETA CALDWELL

DEPUTY

County Clerk

jw

99-06411

9

APP. 123
ORIGINALW
FILED
AUG 13 12 51 PM '01
Shirley B. Pangione
CLERK

1 **ORDR**
 2 ANTHONY P. SGRO, ESQ.
 3 Nevada Bar # 3811
 4 PATTI & SGRO
 5 Nevada State Bar #3811
 6 300 East Charleston Blvd., Suite 105
 7 Las Vegas, Nevada 89104
 8 (702) 385-9595

DISTRICT COURT
 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 CHRISTIAN D. WALKER,

12 Defendant.

CASE NO: C146419
 DEPT. NO: XVI

15 ORDER APPOINTING COUNSEL

16 IT IS HEREBY ORDERED that ANTHONY P. SGRO, ESQ., of the law firm PATTI &
 17 SGRO, LTD., is appointed by this Court as Post-conviction counsel for Defendant CHRISTIAN D.
 18 WALKER, in the above-captioned matter.

20 DATED this 20th day of July, 2001.

21 Respectfully Submitted by:

25 ANTHONY P. SGRO, ESQ.
 26 Nevada Bar # 3811
 27 PATTI & SGRO
 28 Nevada State Bar #3811
 300 East Charleston Blvd., Suite 105
 Las Vegas, Nevada 89104
 (702) 385-9595

John S. McGroarty
 Judge John S. McGroarty

COUNTY CLERK

AUG 13 2001

RECEIVED

APP 124
COPY

FILED

2003 JUL 14 P 12:12

Shirley B. Higgins

1 ANTHONY P. SGRO, ESQ.
2 Nevada State Bar #3811
3 300 East Charleston Blvd., Suite 105
4 Las Vegas, Nevada 89104
5 (702) 385-9595
6 Attorney for Petitioner
7 **CHRISTIAN WALKER**

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 * * * * *

11 CHRISTIAN D. WALKER,
12
13 Petitioner
14
15 vs.
16 E.K. McDANIEL, WARDEN, and
17 THE STATE OF NEVADA,
18
19 Respondents.

Case No. C146419

Dept. No. XVI

**PETITION FOR WRIT
OF HABEAS CORPUS
(POST-CONVICTION)**

7-2803
941

20 **PETITION FOR WRIT OF HABEAS CORPUS**
21 **(POST-CONVICTION)**

22 1. Name of institution and county in which you are presently imprisoned or where and how you
23 are presently restrained of your liberty: **Ely State Prison.**

24 2. Name and location of court which entered the judgment of conviction under attack:

25 **Eighth Judicial District Court in Clark County, Nevada.**

26 3. Date of judgment of conviction: **January 05, 1999.**

27 4. Case number: **C146419.**

28 5. (a) Length of sentence: **4 to 10 years with 4 to 10 years consecutive.**

APP. 125

1 6. Are you presently serving a sentence for a conviction other than the conviction under attack in
2 this motion? No.

3
4 If "yes," list crime, case number and sentence being served at this time:

5 N/A.

6
7 7. Nature of offense involved in conviction being challenged:

8
9 **Aiding and Abetting Attempted Murder.**

10 8. What was your plea? (check one)

11
12 (a) Not guilty X...

13
14 (b) Guilty

15 (c) Guilty but mentally ill

16
17 (d) Nolo contendere

18
19 9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or
20 information, and a plea of not guilty to another count of an indictment or information, or if a plea
21 of guilty or guilty but mentally ill was negotiated, give details: N/A.

22
23 10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

24 (a) Jury ...X...

25
26 (b) Judge without a jury

27 11. Did you testify at the trial? Yes No ...X....

28

APP. 126

1 12. Did you appeal from the judgment of conviction? Yes ...X... No

2
3 13. If you did appeal, answer the following:

4
5 (a) Name of court: **Nevada Supreme Court**

6 (b) Case number or citation: **#33637.**

7
8 (c) Result: Conviction **DISMISSED.**

9 (d) Date of result: **JUNE 21, 1999.**

10
11 (Attach copy of order or decision, if available.)

12
13 14. If you did not appeal, explain briefly why you did not: **N/A.**

14 15. Other than a direct appeal from the judgment of conviction and sentence, have you previously
15 filed any petitions, applications or motions with respect to this judgment in any court, state or
16 federal? Yes ...X... No

17
18 16. If your answer to No. 15 was "yes," give the following information:

19
20 (a) (1) Name of Court: **8th Judicial District Court.**

21 (2) Nature of proceeding: **Motion For Appointment of Post-Conviction Counsel.**

22 (3) Grounds raised: **Request for Counsel**

23
24 17. Has any ground being raised in this petition been previously presented to this or any other
25 court by way of petition for habeas corpus, motion, application or any other post-conviction
26 proceeding? **NO.**

27
28

1 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages
2 you have attached, were not previously presented in any other court, state or federal, list briefly
3 what grounds were not so presented, and give your reasons for not presenting them. (You must
4 relate specific facts in response to this question. Your response may be included on paper which is
5 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or
6 typewritten pages in length.) : Ground 1 - INEFFECTIVE ASSISTANCE OF COUNSEL
7 arguments are appropriately raised for the first time in Post-Conviction proceedings.
8

9
10 Grounds 2, 3, & 4 below - Were not raised because Trial Counsel did not argue those
11 grounds in the Fast Track Direct Appeal despite telling Petitioner he would argue them,
12 after Petitioner asked that they be raised
13

14 II. INACCURATE STATE DEFINITION OF REASONABLE DOUBT
15 EXACERBATED BY ERRONEOUS JURY INSTRUCTIONS VIOLATED
16 PETITIONER'S CONSTITUTIONAL RIGHTS AND CONSTITUTED
17 REVERSIBLE ERROR

18
19 III. ERRONEOUS JURY INSTRUCTIONS VIOLATED PETITIONER'S
20 CONSTITUTIONAL RIGHTS AND CONSTITUTED REVERSIBLE ERROR

21 IV. JUROR MISCONDUCT CONSTITUTED REVERSIBLE ERROR.
22

23 See also POINTS & AUTHORITIES in support of Petition, and AFFIDAVIT of Christian
24 WALKER.
25
26
27
28

APP. 128

1 19. Are you filing this petition more than 1 year following the filing of the judgment of conviction
2 or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must
3 relate specific facts in response to this question. Your response may be included on paper which is
4 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or
5 typewritten pages in length.) :

7 **Yes. After the Nevada Supreme Court dismissal of the direct appeal, defense counsel did**
8 **not inform Petitioner that the appeal had been dismissed, and, in fact, at one time told him**
9 **the appeal was pending when it had already been dismissed. As a result, the one-year**
10 **deadline was missed. See also POINTS & AUTHORITIES in support of Petition;**
11 **AFFIDAVIT OF CHRISTIAN WALKER.**

13
14 20. Do you have any petition or appeal now pending in any court, either state or federal, as to the
15 judgment under attack? Yes No ...XXX...

16
17 21. Give the name of each attorney who represented you in the proceeding resulting in your
18 conviction and on direct appeal: **John P Fadgen.**

19
20 22. Do you have any future sentences to serve after you complete the sentence imposed by the
21 judgment under attack? Yes X.... No If yes, specify where and when it is to be served, if
22 you know: **Here in the State of Nevada, after this sentence is completed.**

1 23. State concisely every ground on which you claim that you are being held unlawfully.
2 Summarize briefly the facts supporting each ground. If necessary you may attach pages stating
3 additional grounds and facts supporting same.
4

5 (a) Ground one: **PETITIONER'S CONVICTION MUST BE REVERSED BECAUSE THE**
6 **INEFFECTIVE ASSISTANCE OF HIS DEFENSE COUNSEL DURING TRIAL DENIED**
7 **HIM DUE PROCESS OF LAW UNDER BOTH THE UNITED STATES**
8 **CONSTITUTION AND THE NEVADA CONSTITUTION. U.S.C.A. Const. Amend. 4, 5,**
9 **6, 14.**
10

11 Supporting FACTS (Tell your story briefly without citing cases or law.): See Points &
12 Authorities in support of Petition.
13

14 (b) Ground two: **INACCURATE STATE DEFINITION OF REASONABLE DOUBT**
15 **EXACERBATED BY ERRONEOUS JURY INSTRUCTIONS VIOLATED**
16 **PETITIONER'S CONSTITUTIONAL RIGHTS AND CONSTITUTED REVERSIBLE**
17 **ERROR. U.S.C.A. Const. Amend. 4, 5, 6, 14.**
18

19 Supporting FACTS (Tell your story briefly without citing cases or law.): See Points &
20 Authorities in support of Petition.
21

22 (c) Ground three: **ERRONEOUS JURY INSTRUCTIONS VIOLATED PETITIONER'S**
23 **CONSTITUTIONAL RIGHTS AND CONSTITUTED REVERSIBLE ERROR. U.S.C.A.**
24 **Const. Amend. 4, 5, 6, 14.**
25

26 Supporting FACTS (Tell your story briefly without citing cases or law.): See Points &
27 Authorities in support of Petition.
28

APP. 130

1 (d) Ground four: **JUROR MISCONDUCT CONSTITUTED REVERSIBLE ERROR.**

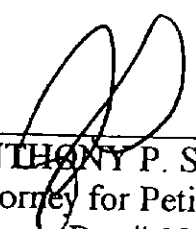
2 **U.S.C.A. Const. Amend. 4, 5, 6, 14.**

3
4 Supporting FACTS (Tell your story briefly without citing cases or law.): **See Points &**
5 **Authorities in support of Petition.**

6
7 **WHEREFORE**, Petitioner WALKER prays that the court grant Petitioner relief to
8 which he may be entitled in this proceeding.

9
10 **EXECUTED** at Las Vegas, NV on the 25 day of June of the year 2003.

11 By:

12
13 
14 ANTHONY P. SGRO, ESQ.
15 Attorney for Petitioner
16 Nevada Bar # 3811
17 PATTI & SGRO
18 Nevada State Bar #3811
19 300 East Charleston Blvd., Suite 105

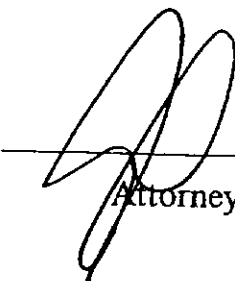
20
21 Las Vegas, Nevada 89104
22 (702) 385-9595
23
24
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27
28

APP. 131

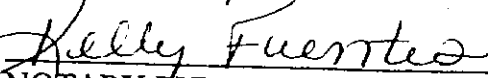
VERIFICATION

Under penalty of perjury, the undersigned declares that he is Attorney for the Petitioner named in the foregoing Petition and knows the contents thereof, that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true. Further, the Petitioner has personally authorized me, as his attorney, to commence this action.

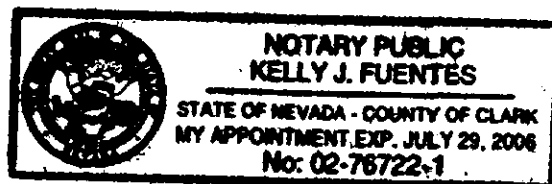
DATED this 25 day of June, 2003.


Attorney for Petitioner

SUBSCRIBED and SWORN before me
this 25 day of June, 2003.


NOTARY PUBLIC in and for said
COUNTY and STATE

ANTHONY P. SGRO, ESQ.
Nevada Bar # 3811
PATTI & SGRO
Nevada State Bar #3811
300 East Charleston Blvd., Suite 105
Las Vegas, Nevada 89104
(702) 385-9595



APP. 132

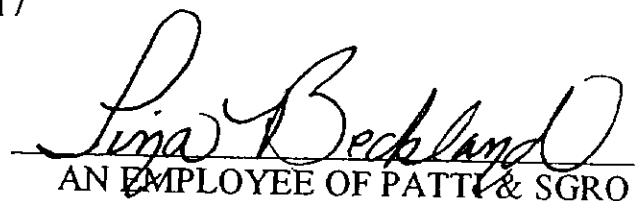
CERTIFICATE OF MAILING

I hereby certify that on the 14TH day of JULY, 2003, I placed a copy of the
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) regarding the above-
captioned matter, into a sealed envelope and deposited same in the Post Office in the City of Las
Vegas, County of Clark, State of Nevada, with postage prepaid, directed to

DAVID ROGER, ESQ.
District Attorney's Office
200 S. Third St.
Las Vegas, Nevada 89155

E.K. McDANIEL
Warden, Ely State Prison
P.O. Box 1989
Ely, NV 89301

Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701-4717


AN EMPLOYEE OF PATTI & SGRO

APP. 133

EXHIBIT 1
(Affidavit of Christian Walker)

**AFFIDAVIT OF CHRISTIAN DORAN WALKER IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

STATE OF NEVADA)

COUNTY OF CLARK)

ss

CHRISTIAN DORAN WALKER, having first been duly sworn, deposes, and states:

1. That your affiant was previously represented at trial and on direct appeal in this matter by attorney JOHN P. FADGEN, ESQ. beginning in October 1997.

2. That your affiant makes this Affidavit in support of his Writ of Habeas Corpus (Post-Conviction) for Case #C146419, Eighth Judicial District Court, Clark County, Nevada.

3. That your affiant has full knowledge of all matters contained herein and is competent to testify thereto.

4. That your affiant spoke with defense counsel Mr. Fadgen after I was convicted in this matter, and I expressed to Mr. Fadgen that I wanted all meritorious issues to be argued in my direct appeal, including the Jury Misconduct issues on which he made Mistrial requests during trial.

5. That your affiant later learned that only one issue was argued in the filed direct appeal, and that no arguments were made concerning the Juror Misconduct issues, all expressly contrary to your affiant's earlier expressed desires and discussions with Mr. Fadgen.

6. That sometime during the year 2000, your affiant had a hearing in an unrelated Justice Court proceeding where he was also represented by Mr. Fadgen, and spoke with Mr. Fadgen concerning the status of the direct appeal that filed in this case.

7. That during the discussion referred to in paragraph 6, your affiant was told by Mr. Fadgen that the appeal was still pending, and had not yet been ruled on by the Nevada Supreme Court.

8. That after Mr. Fadgen died in March 2001, your affiant later learned for the first time that the Nevada Supreme Court appeal had been dismissed back in 1999.

APP. 135

1 9. That your affiant and others were aware before trial that the co-defendant in the case, my
2 cousin Johnny Walker, had mailed a signed letter to John Fadgen where he confessed to the crime,
3 offered to testify on my behalf, and admitted that I was not involved in any of his planning, and had
4 not in any way aided him in the crime he committed.
5

6 10. That well before trial in this case, your affiant had seen the letter referred to in Paragraph
7 9 in John Fadgen's possession, and had also discussed the letter with John Fadgen concerning his
8 intentions for the letter at trial.

9 11. That at trial John Fadgen did not introduce the letter referred to in Paragraph 9 into
10 evidence, or call Johnny Walker to testify as a witness on my behalf.
11

12 12. That Mr. Fadgen did not want me to testify at trial, and told me the reason was that if
13 I testified, evidence concerning another murder trial I was facing would be introduced into evidence
14 to impeach my testimony in this case.
15

16 13. That on the last day of trial, I insisted on testifying despite what Mr. Fadgen had told me,
17 and Mr. Fadgen then threatened to immediately withdraw from my case unless I chose not to testify.
18 Because the trial was almost over, and I was concerned about my representation, and how everything
19 would look to the jurors who held my future in their hands, I acquiesced to Mr. Fadgen's threat, and,
20 under such duress, did not testify at trial.

21 FURTHER YOUR AFFIANT SAYETH NAUGHT.

22 Under the Penalty of Perjury pursuant to N.R.S. 208.165, the above Affidavit is true and
23 correct to the best of my knowledge.
24

25 DATED this 11 day of June, 2003.
26

27 
28 CHRISTIAN DORAN WALKER

APP. 136

EXHIBIT 2
(Affidavit of Johnny Walker)

APP. 137

AFFIDAVIT OF JOHNNY H. WALKER

State of Nevada }
County of White Pine } §§

Johnny Walker being first dully sworn, deposes and says;
That your affiant is presently incarcerated at Ely State Prison.

That on or about October, 1997, I contacted via letter
MR. John Fadgen, Christian Walker's attorney at 616 S. Third
Street, Las Vegas, Nevada 89101 regarding the then pending
Attempted Murder and Battery w/ the use of a deadly weapon
charges.

That the contents of the above-mentioned letter was as
follows;

That Christian Walker told me he thought either Lionel
or David stole his necklace. I listened and watched his torment
at having lost his necklace. He then told me its not that
important, its only a material item, and the necklace could be
replaced. While I observed him agonizing over the necklace, I
had already decided I would get it back for him. I never told
him my thoughts on the matter, I kept my feelings to myself.

Since Christian was in a better mood we decided to go to
a friends house. On the way over there, we ran into David Dimas,
one of the people who may have stolen the necklace. We started
talking to him and his friend Brandon. We all went over to the
nearby school and smoked some marijuana. Something about his
behavior rubbed me the wrong way. He was smug, as if he had
gotton away with stealing the necklace. Without thinking I shot
at him and hit him. I could see Christian was scared, he didn't
move, he just stood there with a stunned look on his face as
David ran off. I told him lets go and we left.

That I never received a responce from Mr. Fadgen regarding
the above letter.

APP. 138

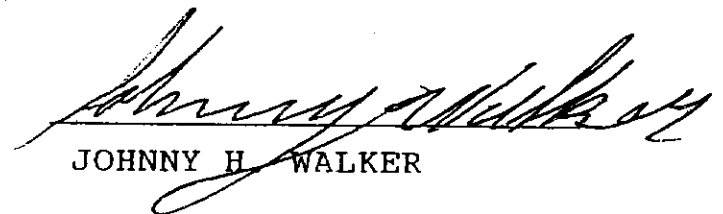
That I also write and spoke family and communicated to them the information contained in this affidavit. I further apologized for getting Christian in this mess, for which he is now incarcerated.

I'm currently incarcerated for my actions described above that day.

Further Affiant Sayeth Naught.

Under the Penalty of Perjury pursuant to N.R.S. 208.165, the above affidavit is true and correct to the best of Affiants personal knowledge.

Dated this 9 day of SEPTEMBER 2002.


JOHNNY H. WALKER

Subscribed and Sworn before me,
on this _____ day of _____ 2002.

Notary Public in and for the
State of Nevada.

APP. 139

COPY

FILED

2003 JUL 14 P 12:10

Shirley B. Higgins

1 ANTHONY P. SGRO, ESQ.
Nevada State Bar #3811
2 JAMES A. COLIN, ESQ.
Nevada State Bar #6257
3 PATTI & SGRO
300 East Charleston Blvd., Suite 105
4 Las Vegas, Nevada 89104
(702) 385-9595
5 Attorneys for Petitioner
CHRISTIAN WALKER

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

* * * * *

10 CHRISTIAN D. WALKER,

11 Petitioner

Case No. C146419

12 vs.

Dept. No. XVI

13 E.K. McDANIEL, WARDEN, and
14 THE STATE OF NEVADA,

15 Respondents.

16
17 POINTS AND AUTHORITIES
18 IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

19 (EVIDENTIARY HEARING REQUESTED)

20 COMES NOW, Petitioner CHRISTIAN D. WALKER, by and through his attorneys,
21 ANTHONY P. SGRO and JAMES A. COLIN of PATTI & SGRO, and for his Points and
22 Authorities in support of Petition for Writ of Habeas Corpus (Post-Conviction) states as follows:

23
24 STATEMENT OF THE CASE

25 CHRISTIAN D. WALKER (hereinafter referred to as WALKER), was charged by way of
26 Information on October 29, 1997 with Attempted Murder with use of a deadly weapon, and
27 Battery with use of a deadly weapon. Before Christian WALKER's trial, his co-defendant cousin
Johnny Walker was convicted of Battery with a Deadly Weapon in a separate trial for the same

APP. 140

1 underlying incident. Johnny Walker was also sentenced before Christian WALKER's trial, on
2 October 20, 1998. Johnny Walker's availability as a witness in the instant proceeding was not
3 investigated, tested, or determined. On November 2, 1998, the trial of Christian WALKER
4 began. Then, after a three day trial by jury in the Eighth Judicial District Court, on November 5,
5 1998, Christian WALKER was found guilty of Attempted Murder with use of a deadly weapon,
6 and was sentenced to a minimum of 48 months and a maximum of 120 months, with equal and
7 consecutive 48 month minimum, 120 month maximum for use of a firearm.

8 A Notice of Appeal was filed on January 20, 1999, and a Fast Track statement which only
9 alleged one (1) appellate issue was then filed with the Nevada Supreme Court by trial counsel
10 John Fadgen, Esq. on May 17, 1999. Only one (1) issue was alleged in this direct appeal despite
11 Mr. WALKER's expressed desire to trial counsel that additional grounds, including juror
12 misconduct, be argued to the Nevada Supreme Court. See EXHIBIT 1 - AFFIDAVIT of
13 Christian WALKER. A Fast Track response was filed by the State on May 28, 1999 and the Fast
14 Track appeal was then dismissed by the Nevada Supreme Court on June 21, 1999 because the one
15 (1) argued issue was held not properly preserved for appeal by objection at trial.

16 The Petitioner was never informed by counsel John Fadgen, Esq. that the Fast Track
17 appeal had been dismissed, and believed the case to be still ongoing and pending before the
18 Nevada Supreme Court almost two (2) years later when Mr. Fadgen died in March 2001. Indeed,
19 Mr. Fadgen had actually told Mr. WALKER that the appeal was still pending after it had been
20 dismissed by the Supreme Court. See EXHIBIT 1 - AFFIDAVIT of Christian WALKER. The
21 undersigned was working on another unrelated case of WALKER's around this time-frame in
22 mid-2001, and asked this Honorable Court to be appointed to investigate the post-conviction
23 issues in this case. The undersigned was appointed to this case on August 13, 2001, and after a
24 delay by counsel awaiting important Nevada and 9th Circuit constitutional caselaw to develop,
25 such delay no fault of the Petitioner, the instant Petition along with these Points and Authorities
26 was filed.

27

STATEMENT OF FACTS

Christian Walker was accused with his cousin Johnny Walker of being responsible for shooting David Dimas during the late evening hours of September 22, 1997. The motive for the shooting, according to the State, was a disagreement over a gold necklace that had occurred between Dimas and Christian WALKER earlier in the day. (TT¹, 11/2, pp. 19-22, 27) (TT, 11/3, pp. 10-26) (TT, 11/4, pp. 104-106). It was alleged by the State that Christian WALKER believed David Dimas stole his gold necklace and was seeking revenge, resulting in the instant shooting. (TT, 11/2, pp. 18-23). It was also asserted that on the night in question, at a park across from David Dimas' house, Johnny and Christian WALKER smoked pot with David Dimas, and a friend of Dimas', Brandon Douzat. In both the Information and at trial, the State argued Mr. Dimas was shot through the neck by shooter Johnny Walker, but also asserted that Christian WALKER was guilty of the crime under a theory of aiding and abetting, in that he acted in concert with Johnny throughout the crime. (TT, 11/2, pp. 17-22, 27) (TT, 11/4, pp. 102-107).

Evidence that would have clearly disproven the State's theory of the crime existed and was in the possession of defense counsel John Fadgen, Esq. well before the time of trial of either defendant, but was never presented to the jury in Christian WALKER's trial. Namely, a written confession existed which was authored by the shooter Johnny Walker shortly after the incident. The confession had been sent to, and received by, Christian WALKER's defense counsel in 1997. In this writing, Johnny confessed and insisted that he acted alone. See EXHIBIT 2 - AFFIDAVIT of Johnny H. Walker; EXHIBIT 1 - AFFIDAVIT of Christian WALKER. The written confession was admissible if Johnny testified, and, likewise, admissible as a statement against penal interest pursuant to N.R.S. 51.345 if Johnny was deemed unavailable to testify for any reason, including his assertion of the Fifth Amendment.

¹"TT" = Trial Transcript for the instant case. Trial took place over four (4) days from November 2nd, 1998 through November 5th, 1998.

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1 The trial of Christian WALKER began on Monday, November 2, 1998 with immediate
2 concern about the jury being infected with knowledge that Christian WALKER was facing
3 another trial, a murder trial, proceedings in front of Judge Mosley in Department XIV. (TT, 11/2,
4 p. 3). A mistrial request was ultimately made on these exact grounds, but denied by the Judge.
5 (TT, 11/5, p.37, 39). The State's first witness in the instant case was the victim David Dimas
6 who testified that Johnny Walker shot him unexpectedly, but that Christian Walker never said or
7 did anything. (TT, 11/2, pp. 61-64, 67, 88, 122-123, 133).

8 The State called two witnesses to establish the lost necklace as a motive, and then called
9 the surgeon who treated Mr. Dimas that night. (TT, 11/3, pp. 3, 16, 46). Mysty Fuller was then
10 called, and testified that Johnny and Christian were cousins and friends. (TT, 11/3, pp. 66-68).
11 The State then called the other individual present at the park that night, Brandon Douzat. (TT,
12 11/3, p. 86). Mr. Douzat never saw who shot a gun, but did testify that he saw Chris and Johnny
13 running from the scene. (TT, 11/3, p. 108) (TT, 11/4, p. 43). Mr. Douzat admitted under cross
14 examination that he had never told anyone about seeing Chris and Johnny running prior to that
15 day in court. (TT, 11/3, p. 125).

16 The State rested on Wednesday, November 4, 1998, and settled jury instructions that
17 same day. (TT, 11/4, pp. 51, 56). Defense counsel did object to Jury instruction #20, called two
18 witnesses, and rested. (TT, 11/4, pp. 60-61, 64, 70, 78). Closing arguments were made, and the
19 jury retired to consider its verdict. (TT, 11/4, pp. 108, 120, 125). Christian WALKER was
20 convicted the next day, and defense counsel made a mistrial request based on grounds of juror
21 misconduct. (TT, 11/5, pp. 4, 8-37). The mistrial request was denied. (TT, 11/5, p. 39). Again,
22 no argument was ever made to the Nevada Supreme Court on these juror misconduct grounds,
23 despite the expressed desires of Petitioner.

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A. FAILURE TO USE JOHNNY WALKER'S CONFESSION

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- (1) Defense counsel misinformed WALKER concerning his right to testify
- (2) Defense counsel threatened to withdraw from the case if WALKER testified
- (3) Defense counsel failed to object to prosecution's inaccurate definition of reasonable doubt during closing argument
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DEFENSE COUNSEL WAS FURTHER INEFFECTIVE FOR (1) FAILING TO RAISE MERITORIOUS ISSUES ON DIRECT APPEAL THAT HAD BEEN REQUESTED BY PETITIONER, AND (2) THEN FAILING TO INFORM PETITIONER OF THE DISMISSAL OF HIS DIRECT APPEAL BY ACTUALLY TELLING HIM THE APPEAL WAS STILL PENDING *AFTER* IT HAD BEEN DISMISSED.

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ARGUMENT

I. PETITIONER'S CONVICTION MUST BE REVERSED BECAUSE THE INEFFECTIVE ASSISTANCE OF HIS DEFENSE COUNSEL DURING TRIAL DENIED HIM DUE PROCESS OF LAW UNDER BOTH THE UNITED STATES CONSTITUTION AND THE NEVADA CONSTITUTION.

A. FAILURE TO USE JOHNNY WALKER'S CONFESSION

Petitioner's counsel was ineffective for primarily one reason: He was in possession of vital evidence that could have exonerated Petitioner, yet inexplicably failed to use that evidence at trial.

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1 See EXHIBIT 2 - AFFIDAVIT of Johnny H. Walker; EXHIBIT 1 - AFFIDAVIT of Christian
2 WALKER; U.S.C.A. Const. Amend. 4, 5, 6, 14; Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.
3 1994); Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002). A written confession existed which was
4 authored by the shooter Johnny Walker shortly after the incident. The confession had been sent
5 to, and received by, Christian WALKER's defense counsel in 1997. However, counsel never
6 investigated or introduced this piece of evidence, and did not call Johnny Walker as a witness to
7 testify. Importantly, this was not a "tactical" trial decision made for valid "strategic" purposes. It
8 was a grievous error which rises to the level of ineffective assistance of counsel as contemplated
9 by Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); U.S.C.A. Const. Amend. 6,
10 14. As in Sanders v. Ratelle, describing defense counsel's conduct here as "strategic" strips the
11 term of all substance.

12 Claims of ineffective assistance are reviewed under the reasonably effective assistance
13 standard outlined by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668
14 (1984). This includes those ineffective assistance claims based on a duty to investigate and
15 present available evidence. Strickland provides a two prong test to determine whether counsel's
16 assistance was ineffective. First, a defendant challenging the adequacy of his counsel's
17 representation must show: (1) counsel's performance was deficient, i.e., counsel's representation
18 fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced
19 the defendant, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors,
20 the result of the proceeding would have been different. A reasonable probability is a probability
21 sufficient to undermine confidence in the outcome." Id. at 687-89, 694; Dawson v. State, 108
22 Nev. 112, 115, 825 P.2d 593, 595 (1992).

23 The State believed Mr. Dimas was shot through the neck by shooter Johnny Walker,
24 Christian's cousin, but also asserted that Christian WALKER was guilty of the crime under a
25 theory of aiding and abetting, in that he acted in concert with Johnny throughout the crime. (TT,
26 11/2, pp. 17-22, 27) (TT, 11/4, pp. 102-107). However, again, back in 1997, Johnny Walker had
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1 authored a confession letter which he signed and mailed to defense counsel Fadgen. It is
2 independently known and provable that defense counsel received, read, and was aware of this
3 letter. However, defense counsel failed to properly investigate and follow-up on this letter, never
4 introduced it into evidence at trial, and never called Johnny Walker as a witness at trial. (TT,
5 ALL). In the letter Johnny Walker confessed to his involvement in the crime, asserted that
6 Christian WALKER did not know of, approve of, or share in his plans, and that he would testify
7 truthfully to these facts so as to exonerate Christian. See EXHIBIT 2 - AFFIDAVIT of Johnny
8 H. Walker. This letter was sent in 1997, well before Johnny Walker was convicted of this crime,
9 making it extremely trustworthy, and always admissible as a declaration against penal interest at
10 any trial of Christian WALKER's pursuant to N.R.S. 51.345. Defense Counsel's failure to use
11 this evidence at trial was unreasonable, and constitutes ineffective assistance. Sanders v. Ratelle,
12 21 F.3d at 1457 (It is ineffective assistance where "a written or taped statement . . . would have
13 provided powerful evidence of . . . innocence" but defense counsel "failed to offer into
14 evidence."); Avila v. Galaza, 297 F.3d at 919 ("A lawyer who fails adequately to investigate, and
15 to introduce evidence, evidence which demonstrates his client's factual innocence, or that raises
16 sufficient doubt as to that question to undermine confidence in the verdict renders deficient
17 performance.").

18 The vital evidence in this case, a letter by the shooter tending to exonerate Christian
19 WALKER, was absolutely consistent with the proffered defense theory of the case, and should
20 have been presented to the jury. Although Christian WALKER was accused as an aider and
21 abetter, and not specifically asserted to be the shooter at trial, the letter from Johnny Walker still
22 tended to explain away the charge against Christian with respect to his knowledge and intent, and
23 was vital exonerating evidence. Defense Counsel's failure to present this evidence was not an
24 objectively reasonable decision, prejudicing Petitioner, and constituting ineffective assistance.
25 Strickland v. Washington, 466 U.S. at 668; Sanders v. Ratelle, 21 F.3d 1446, 1456; Avila v.
26 Galaza, 297 F.3d 911, 919; See also Luna v. Cambra, 306 F.3d 954, (9th Cir. 2002) (defense
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1 counsel's deficient performance in failing to obtain inculpatory statement from exonerating
2 witness prejudiced Petitioner); Cheung v. Maddock, 32 F.Supp.2d 1150 (N.D. California 1998)
3 (trial counsel's failure to take the steps necessary to have extra-judicial admission of another
4 admitted into evidence "undoubtedly prejudiced Petitioner").

5 Defense counsel here had argued from the very beginning of trial, in opening statement,
6 that "I submit to you that when all this is over, you will find, one, that Christian Walker didn't
7 lure, didn't aid and abet Johnny Walker in the shooting. . . I submit to you that you will find he
8 didn't lure anyone over there. There was no agreement." (TT, 11/2, p. 33). However, despite
9 this early assertion by defense counsel, the exact evidence that could have proven his stated point
10 and potentially cleared Petitioner was totally ignored and never given to the jury. (TT, ALL).
11 Had the jury received this vitally important written confession, authored at a time when it
12 subjected Johnny Walker to severe criminal liability, and possibly heard testimony from the actual
13 shooter concerning what happened that night, Petitioner could very well have been found not
14 guilty, or perhaps, as was his cousin, guilty only on the lesser included offense of Battery which
15 does not contain the same intent requirement as attempted murder. The second prejudice prong
16 of Strickland is thereby satisfied, as there is a reasonable probability the result of the trial would
17 have materially different.

18 Standard of review

19 The United States Supreme Court has held that the right to counsel is a fundamental right
20 of criminal defendants, which insures fairness and legitimacy in the adversarial process.
21 Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). The right to counsel is the right to effective
22 assistance of counsel, McMahon v. Richardson, 397 U.S. 759, 771 (1970), and as discussed,
23 supra, claims of ineffective assistance are reviewed under the two-pronged reasonably effective
24 assistance standard outlined by the United States Supreme Court in Strickland v. Washington, 466
25 U.S. at 668. A court may consider the two Strickland prongs in any order, and need not consider
26 both if the defendant makes an insufficient showing on either one. Id. at 697. In determining
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1 whether counsel's conduct falls within the broad range of professionally acceptable conduct, this
2 Court will not view counsel's actions through "the distorting lens of hindsight". Rather, under the
3 rule of contemporary assessment, an attorney's actions must be examined according to what was
4 known and reasonable at the time the attorney made his choices. Turner v. Calderon, 281 F.3d
5 851 (2002). In considering an ineffective assistance claim, the court must make every effort to
6 eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's
7 challenged conduct, and to evaluate the conduct from counsel's perspective at the time, and
8 counsel cannot be deemed ineffective merely because, with the benefit of hindsight, court
9 determines that other trial strategies or expert witnesses may have been a better choice. Id.

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Even after noting, and giving great deference to the above standard of review including
interpretative limitations on ineffective assistance claims, the instant case demands relief. The
evidence at issue was in written form, known by defense counsel, consistent with the defense
theory, extremely trustworthy, and exonerated Petitioner because it was so far contrary to Johnny
Walker's penal interests when made. See EXHIBIT 2. Thus, defense counsel's actions and
decisions respecting this evidence were deficient, obviously ineffective at the time made, and
undermine confidence in the trial's outcome, mandating that Petitioner's conviction be reversed.
Strickland v. Washington, 466 U.S. at 668; Sanders v. Ratelle, 21 F.3d 1446, 1456; Avila v.
Galaza, 297 F.3d 911.

In Sanders, the defendant's brother confessed that he was the murderer, and his brother
was innocent. "These confessions were not belated efforts designed to save a brother who had
been convicted. They were made from the very inception of these proceedings." Sanders, 21
F.3d at 1456. This is a very similar factual situation to the instant proceeding where Christian

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1 WALKER's cousin Johnny confessed via letter shortly after the incident to hatching "the plan" by
2 himself and not cooperating with or acting in concert in any way with Christian WALKER. Just
3 as in Sanders, this confession was made early in the proceedings, before either cousin had stood
4 trial or was convicted, back around October 1997. See EXHIBIT 2 - AFFIDAVIT of Johnny H.
5 Walker. Because authored before adjudication, this confession was clearly contrary to Johnny
6 Walker's penal interests when made. Although it subjected himself to criminal penalty as a result,
7 Johnny Walker was willing to honestly exonerate Christian WALKER, because his cousin
8 Christian was an innocent family member worthy of the honest gesture. Family loyalties can
9 explain the honest confession in this case, just as in Sanders v. Ratelle.
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12 In Sanders, the defense attorney ignored the defendant's brother's confession and, indeed,
13 went out of his way to suppress this evidence and ensure that this important exonerating
14 information would not be presented to the jury. Sanders, 21 F.3d at 1456. Well prior to trial, the
15 defense attorney was alerted to the fact that his client was not the shooter in the crime, but his
16 brother was. This is very similar to the situation we have in the instant case. See EXHIBIT 1, 2.
17 Here, despite the unfortunate, untimely death of defense counsel Fadgen, an evidentiary hearing
18 can further establish Mr. Fadgen's knowledge and possession of Johnny Walker's written
19 confession, and the true circumstances surrounding Mr. Dimas' shooting. It can likewise establish
20 Mr. Fadgen's absolute indifference and inexplicable failure to introduce the vital evidence at trial.
21 Mr. Fadgen's refusal to properly use and investigate this evidence "evidenced a gargantuan
22 indifference to the interests of his client and clearly prejudiced his client's defense." Sanders, 21
23 F.3d at 1455. Again, describing defense counsel's conduct as "strategic" strips the term of all
24 substance. Id. at 1456. The defense could gain much with the introduction of this evidence.
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1 The Court in Sanders held that defense counsel's failure to investigate, listen to, or
2 ultimately introduce into evidence critical information from a key exculpatory witness regarding
3 the basis of his client's most important defense "cannot be deemed a permissible strategy". Id.
4 Fadgen's ineffective assistance likewise "served to deprive [WALKER] of the most critical
5 evidence supporting his best defense." Id. at 1461. Just as in Sanders, given the fact that the jury
6 could have been presented with the trustworthy confession of the guilty party, there can simply be
7 no fair assurance that the verdict would have been the same had WALKER received effective
8 representation." Id. The prejudice prong of Strickland is thereby satisfied. U.S.C.A. Const.
9 Amend. 4, 5, 6, 14.

10 The 2002 case Avila v. Galaza is another case with similar factual circumstances to ours.
11 In Avila, defense counsel failed to investigate evidence that a relative of the defendant was the
12 shooter. The Court held his performance was thereby deficient just as in Sanders, because
13 counsel failed to introduce at trial the evidence of the relative's involvement in the shooting.
14 Avila v. Galaza, 297 F.3d at 921. In our case, Johnny Walker was involved in the shooting, and
15 defense counsel knew and relied on that fact during opening statement, creating expectations in
16 the jury, but, inexplicably failed to introduce the evidence. (TT, 11/2, p.33); See EXHIBIT 2.
17 The relative in Avila had confessed to being the shooter, and had also indicated a strong
18 willingness to testify to that fact, just as Johnny Walker did in the instant case. Avila v. Galaza,
19 297 F.3d at 923. Indeed, here, Johnny Walker explicitly agreed to testify in the written confession
20 he sent to defense counsel, and was, thus, even more likely to testify than the witness in Avila
21 whose willingness to testify was cited by the Court as a very important factor meriting relief. Id.
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23 Under the factual circumstances in our case, relief is merited pursuant to the cited cases,
24 supra. Relevant caselaw has found prejudice by trial counsel's ineffective assistance in objectively
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1 less egregious circumstances than ours. A verdict or conclusion only weakly supported by the
2 record is more likely to have been affected by errors than one with overwhelming record support,
3 and in this circumstance we must consider the relative strength of the prosecution's case.
4 Strickland v. Washington, 466 U.S. at 696; Luna v. Cambra, 306 F.3d at 966. The prosecution's
5 case was not overwhelming here. The victim David Dimas's testimony proved Christian Walker
6 was not the shooter and, in fact, placed his criminal liability in doubt. (TT, 11/2, pp. 61-64, 67,
7 88, 122-123, 133). The remainder of the State's case was similarly questionable when one
8 considers the proper intent requirement for Attempted Murder, infra. Guilt was not strong here,
9 and the facts of our case compare quite favorably to the existing cases on this issue. (TT, ALL).

12 The 9th Circuit in Sanders found defense counsel was deficient by not introducing the
13 exonerating evidence tending to prove defendant was not the shooter, despite five (5) witnesses
14 who testified Sanders was the shooter. Sanders v. Ratelle, 21 F.3d 1446; See also Lord v. Wood,
15 184 F.3d 1083, 1096 (9th Cir. 1999) (counsel ineffective for failure to introduce documents
16 despite strong evidence tying defendant to the murder); Brown v. Myers, 137 F.3d 1154, 1157
17 (9th Cir. 1998) (defense counsel ineffective despite three witnesses who testified defendant was the
18 shooter). In our case, although Christian WALKER was alleged to be guilty as an aider and
19 abetter, the questioned evidence still could have clearly exonerated him.

21 Had Johnny testified, or been found unavailable and his written confession introduced, the
22 intent element of Attempted Murder against Christian WALKER could have been negated, and
23 that evidence should, thereby, have been introduced. Attorney Fadgen had "at his fingertips
24 information that could have undermined the prosecution's case, yet chose not to develop this
25 evidence and use it at trial." Lord v. Wood, 184 F.3d at 1096. Johnny Walker's honest
26 declaration against penal interest could have exonerated Christian WALKER, and defense
27

1 counsel's failure to use it constituted ineffective assistance. Strickland v. Washington, 466 U.S.
2 at 668; Sanders v. Ratelle, 21 F.3d 1446, 1456; Avila v. Galaza, 297 F.3d 911.

3 B. ADDITIONAL CUMULATIVE ERRORS OF DEFENSE COUNSEL

4 Additional errors of defense counsel, when their cumulative nature is considered, also
5 deprived WALKER of his constitutional right to a fair trial. A defendant may prove that he has
6 suffered ineffective assistance of counsel based on the cumulative effect of errors. See Wade v.
7 Calderon, 29 F.3d 1312, 1319 (9th Cir. 1994); See also Big Pond v. State, 101 Nev. 1, 3, 692
8 P.2d 1288, 1289 (1985) (reversal of conviction warranted by cumulative effect of errors);
9 U.S.C.A. Const. Amend. 4, 5, 6, 14; Nevada Constitution Art. I, Sec. 8. In evaluating a
10 defendants claim, the court must ask whether the "multiple deficiencies have the cumulative effect
11 of denying a fair trial to the petitioner" Ewing v. Williams, 596 F.2d 391, 396 (9th Cir. 1979).

12 Here, defense counsel (1) misinformed WALKER concerning his right to testify, (2)
13 threatened to withdraw from the case if WALKER insisted on testifying, (3) failed to object to
14 improper and prejudicial argument, (4) failed to properly object to a challenged jury instruction,
15 and also (5) provided ineffective assistance on direct appeal, *infra*, which constitutes "good cause"
16 to overcome any procedural defaults that may be alleged by the State in this proceeding.

17 First, through his actions, defense counsel prevented Petitioner from testifying at trial in
18 violation of Petitioner's constitutional rights. A criminal defendant's right to testify is a personal
19 and fundamental right, guaranteed by the Fifth, Sixth, and Fourteenth Amendments. U.S.C.A.
20 Const. Amend. 5, 6, 14; Rock v. Arkansas, 483 U.S. 44, 51-56 (1987); Phillips v. State, 105
21 Nev. 631, 782 P.2d 381 (1989). An attorney's decision to override his client's desire to testify
22 can form the basis for an ineffective assistance claim. United States v. Martinez, 883 F.2d 750,
23 752, 755 (9th Cir. 1989) (court must conduct a fact-specific analysis of the attorney's conduct),
24 *vacated on other grounds*, 928 F.2d 1470, 1471 (9th Cir. 1991). Here, defense counsel prevented
25 Petitioner from testifying in two (2) ways: First, defense counsel misinformed Petitioner
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1 concerning the possible consequences of any offered testimony, and then, when Petitioner insisted
2 on testifying, defense counsel improperly threatened to withdraw from representation.

3
4 **(1) Defense counsel misinformed WALKER concerning his right to testify**

5 Defense counsel told Petitioner that if he testified, his pending unadjudicated Murder
6 charge would absolutely be used by the State to impeach his testimony. This defense advice was
7 erroneous. U.S.C.A. Const. Amend. 4, 5, 6, 16; NRS 48.045; NRS 50.085; NRS 50.095;
8 Roever v. State, 114 Nev. 867, 963 P.2d 503 (1998). Because the charge had not yet resulted in
9 a conviction, NRS 50.095 would not allow impeachment. NRS 50.095. Likewise, the pending
10 murder charge could not be introduced to impeach as a "specific instance of conduct" under NRS
11 48.045 and NRS 50.085 unless subject to the general limitations upon relevant evidence and
12 either "relevant to truthfulness" or relevant to some issue other than his character. Under the
13 circumstances of this case, evidence of the unadjudicated murder charge was probably
14 inadmissible, and, thus, incorrect, improper, and incomplete advice was given to Petitioner by
15 defense counsel under Nevada law, preventing his testimony, and constituting ineffective
16 assistance. U.S.C.A. Const. Amend. 5, 6, 14; NRS 48.045; NRS 50.085; NRS 50.095; Roever
17 v. State, 114 Nev. 867.

18
19 **(2) Defense counsel threatened to withdraw from the case if WALKER testified**

20 Then, next, when Petitioner still insisted on testifying, defense counsel Fadgen threatened
21 to withdraw from representation on the last day of trial. See EXHIBIT 1. Under the exact
22 circumstances here, considering the relative strength of the prosecution's case, and especially
23 considering the extremely late stage of trial when the threat was made, this threatened withdrawal
24 by defense counsel violated Petitioner WALKER's due process rights and also constituted
25 ineffective assistance. U.S.C.A. Const. Amend. 4, 5, 6, 14; Iaea v. Sunn, 800 F.2d 861 (9th Cir.
26 1986); See also Nichols v. Butler, 953 F.2d 1550 (11th Cir. 1992) (Petitioner denied both effective
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1 assistance of counsel and his right to testify by his trial attorney's threat to withdraw during trial if
2 defendant exercised his right to testify). In Nichols, the factual circumstances bear a distinct
3 resemblance to the instant case, in that two (2) people were alleged to have committed the
4 charged crime under a theory of aiding and abetting. Like our case, the other individual alleged to
5 be involved was willing to offer testimony tending to exonerate the charged defendant. However,
6 in Nichols, the individual with exonerating information actually *did* testify, distinguishing our case
7 where Johnny Walker's exonerating information was ignored, and making Christian WALKER
8 even more worthy of relief here than Nichols himself. Also, unlike Nichols, WALKER did not
9 have *any* prior Felony convictions to worry about and defense counsel Fadgen mistakenly
10 conveyed the extent of the potential impeachment problems should he choose to testify, supra.

11 When considering the impact and usefulness of potential defendant testimony, it is
12 important to look at the relative strength of the case against the defendant, as the defendant's
13 testimony would obviously be more helpful/useful in a close case. Here, the decision on guilt was
14 arguably close, as the victims's own testimony could exonerate WALKER. Remember, Dimas
15 testified that Johnny Walker shot him unexpectedly, but that Christian Walker never said or did
16 anything. (TT, 11/2, pp. 61-64, 67, 88, 122-123, 133). Thus, just as argued in Argument IA,
17 supra - page 11, we must note the relative strength (weakness) of the prosecution's case, as a
18 verdict or conclusion only weakly supported by the record is more likely to have been affected by
19 errors than one with overwhelming record support. Strickland v. Washington, 466 U.S. at 696.
20 Likewise, the testimony of the defendant is of greater consequence and potential benefit in a case
21 like ours that is close, and where the jury would likely have wanted to hear the defendant's story
22 to explain the incident in question. Had the jury heard from Petitioner WALKER himself here,
23 the jury would have been able to better judge his credibility and assess his demeanor, and the jury
24 more likely would have arrived at an appropriate verdict.

25 Because the evidence here was not overwhelming, and a not guilty verdict remained a
26 possibility, defense counsel's threat to withdraw under these circumstances was particularly
27 egregious. As did Nichols, WALKER continued to insist that he testify even though defense

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1 counsel was against it. Nichols, 952 F.2d at 1552; See EXHIBIT 1. However, despite
2 WALKER's desires, and the likely jury need/desire to hear from him, WALKER's defense
3 counsel simply threatened to withdraw from representation were WALKER to exercise his
4 constitutional rights. Id.; U.S.C.A. Const. Amend. 4, 5, 6, 14. Under this unconstitutional
5 duress, WALKER ultimately "chose" not to testify because "he feared the loss of his counsel in
6 mid-trial". Nichols, 952 F.2d at 1552. WALKER's constitutional rights were thereby violated,
7 his decision not to testify was not voluntary, and defense counsel Fadgen provided ineffective
8 assistance because counsel's threat to withdraw prevented WALKER from testifying at trial. Id.;
9 U.S.C.A. Const. Amend. 4, 5, 6, 14. "It is beyond question that an attorney cannot threaten to
10 withdraw during a trial in order to coerce the defendant to relinquish his fundamental right to
11 testify." Id. "To coerce his client into remaining silent by threatening to abandon him mid-trial
12 goes beyond the bounds of proper advocacy." Id.

13
14 **(3) Defense counsel failed to object to prosecution's inaccurate definition of**
15 **reasonable doubt during closing argument**

16 Defense counsel in this case failed to object to the prosecution's inaccurate definition of
17 reasonable doubt during closing argument. See also, ARGUMENT II, infra. (TT, 11/4, pp. 106-
18 107). In Nevada, NRS 175.211 provides the appropriate definition of reasonable doubt, and also
19 forbids the use of any other definition in criminal cases in Nevada. NRS 175.211. The
20 prosecution here, nonetheless, offered another definition, and defense counsel's failure to object
21 constituted ineffective assistance of counsel. The Nevada Supreme Court has repeatedly
22 "cautioned the prosecutors of this state that they venture into calamitous waters when they
23 *attempt to quantify, supplement, or clarify* the statutorily prescribed reasonable doubt standard."
24 Holmes v. State, 114 Nev. 1357, 1366, 972 P.2d 337, 343 (1998) (emphasis added); See also
25 Wesley v. State, 112 Nev. 503, 514, 916 P.2d 793, 801 (1996) ("when prosecutors attempt to
26 rephrase the reasonable doubt standard, they venture into troubled waters."); Quillen v. State, 112
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1 Nev. 1369, 1382, 929 P.2d 893, 902 (1996) (warning that analogizing reasonable doubt to most
2 important decisions in life is improper because such decisions are wholly unlike the one jurors
3 must make in a criminal case.”); Lord v. State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991)
4 (“Parties to a criminal case should assiduously avoid such attempts to quantify the concept of
5 reasonable doubt.”).

6 However, despite these many, and oft-repeated, warnings from the Nevada Supreme
7 Court concerning prosecutor comments on reasonable doubt, the prosecutor here disregarded the
8 Court. During closing argument, this prosecutor made a clear attempt to quantify, supplement,
9 and clarify the reasonable doubt standard by rephrasing it to the jury:

10 The burden of proof in a criminal case is beyond a
11 reasonable doubt. That is the burden, and it’s a very serious
burden, but it’s not the highest burden you could ever imagine.

12 You know, you see on court – on T.V. in court, you see
13 people talking about beyond a shadow of a doubt, beyond all
imaginary doubt, beyond all possible doubt. That’s not the way it
is. It’s beyond a reasonable doubt. That’s all. A reasonable doubt.

14 **What does that mean? *It means*** if you have a reason that
15 you can say he’s not guilty, he’s not guilty because that’s
reasonable doubt. But if you just have this little hunch, this little
thing in the back of your mind, you know, that is not a reasonable
doubt.

16 If there’s a reason that you can say he’s not guilty, that is
17 reasonable doubt. It is not an insurmountable burden, folks. It
couldn’t be. **We convict people up and down the halls every**
18 **day.** If it were such an insurmountable burden, then nobody would
ever be found guilty. So it’s beyond a reasonable doubt.

19 (TT, 11/4, pp. 106-108) (emphasis added).

20 This argument by the prosecutor was inappropriate and improper, and should have been
21 objected to by defense counsel. Id.; Strickland v. Washington, 466 U.S. 668; U.S.C.A. Const.
22 Amend. 4, 5, 6, 14. The prosecutor’s oral argument here is similar to, or possibly even originated
23 from, the written jury instruction specifically disapproved of in at least three (3) Nevada Supreme
24 Court cases. McCullough v. State, 99 Nev. 72, 657 P.2d 1157 (1983); Page v. State, 94 Nev.
25 386, 580 P.2d 477 (1978); Jackson v. State, 93 Nev. 677, 572 P.2d 927 (1977) (Disapproved
26 instruction reads: “It is not necessary that the defendant’s guilt should be established beyond any
27

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1 doubt or to an absolute certainty, but instead thereof that the defendant's guilt must be established
2 beyond a reasonable doubt as hereinafter defined.”).

3 The failure of defense counsel to even object constitutes ineffective assistance, and this
4 unchallenged argument by the State, when coupled with Jury Instruction #20, discussed, *infra*,
5 constituted plain reversible error, as it violated the Constitutional rights of Petitioner. U.S.C.A.
6 Const. Amend. 4, 5, 6, 14; *See* ARGUMENT II, *infra*.

7 **(4) Defense counsel failed to properly object to a challenged jury instruction**

8 In the Supreme Court Order dismissing the direct appeal in this matter, filed June 21,
9 1999, the Nevada Supreme Court held that, during trial, defense counsel failed to object to Jury
10 Instruction #20 on the basis asserted in the direct appeal, namely, that under the instruction as
11 given, the jury could find guilt on attempted murder charge without finding the requisite criminal
12 intent for attempted murder. Therefore, the Supreme Court further held that appellant's
13 contention was not properly preserved for appellate review, appellate review was thereby
14 precluded, and because this was the only issue argued on direct appeal, the appeal must be
15 dismissed. Because this decision of the Nevada Supreme Court is law of the case, the
16 determination cannot now be effectively challenged by Petitioner, this important appellate issue
17 bearing *directly* on the issue of intent/guilt was forever lost, and, therefore, Petitioner WALKER
18 now contends that defense counsel's failure to properly object to Jury Instruction #20 constitutes
19 ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668; U.S.C.A. Const.
20 Amend. 4, 5, 6, 14.

21 Generally, an ineffective assistance of counsel claim based on counsel's failure to object to
22 a jury instruction requires a showing of prejudice under *Strickland*. *United States v. Swanson*,
23 943 F.2d 1070, 1073 (9th Cir. 1991); *Strickland v. Washington*, 466 U.S. 668. Such a showing
24 of prejudice *can* ultimately be made here, as the jury instruction #20 in question relates directly to
25 guilt of the defendant as it erroneously allows a finding of guilt of Attempted Murder without the
26 requisite criminal intent being found. *See* ARGUMENT II, *infra*. Because the proper objection
27 was not made by defense counsel, WALKER was severely prejudiced, as the jury could have

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1 returned a different verdict had the appropriate instruction been given. Strickland v. Washington,
2 466 U.S. at 668; See also ARGUMENT II, *infra*. In any case, WALKER has suffered ineffective
3 assistance of counsel based on the cumulative effect of defense counsel's various errors which
4 permeated this case. Wade v. Calderon, 29 F.3d at 1319; U.S.C.A. Const. Amend. 4, 5, 6, 14;
5 Nevada Constitution Art. I, Sec. 8.

6 **DEFENSE COUNSEL WAS FURTHER INEFFECTIVE FOR (1) FAILING TO RAISE**
7 **MERITORIOUS ISSUES ON DIRECT APPEAL THAT HAD BEEN REQUESTED BY**
8 **PETITIONER, AND (2) THEN FAILING TO INFORM PETITIONER OF THE**
9 **DISMISSAL OF HIS DIRECT APPEAL BY ACTUALLY TELLING HIM THE APPEAL**
10 **WAS STILL PENDING AFTER IT HAD BEEN DISMISSED.**

11 Errors by defense counsel that rise to the level of ineffective assistance establish cause and
12 prejudice to excuse any default under NRS 34.726 and NRS 34.810(1)(b). Coleman v.
13 Thompson, 501 U.S. 722, 753-54, 111 S.Ct. 2546, 2566-67 (1991); Crump v. Warden, 113 Nev.
14 293, 934 P.2d 247 (1997); Stewart v. Warden, 92 Nev. 588, 589, 555 P.2d 218, 219 (1976). If
15 any procedural default or Laches is alleged by the State here, the facts of this case provide
16 appropriate "good cause" and prejudice to Petitioner to excuse such default. Here, Defense
17 counsel on direct appeal failed to raise issues specifically requested by Petitioner, and also failed
18 to offer any excuse for his failure to do so. WALKER did not learn of the omissions until after
19 the appeal was already filed. See EXHIBIT 1. Defense counsel's conduct constituted ineffective
20 assistance and provides "good cause" to excuse default. Crump v. Warden, 113 Nev. at 293;
21 Stewart v. Warden, 92 Nev. at 588. Ultimately, only one issue was raised on appeal and that one
22 issue was held not properly preserved, and the appeal dismissed. Because WALKER effectively
23 lost his right to direct appeal due to the actions of defense counsel, and because convicted persons
24 have the right to counsel on direct appeal, this Honorable Court properly remedied the situation
25 by appointing the undersigned to raise any meritorious issues in this Petition. Lozada v. State,
26 110 Nev. 349, 871 P.2d 944 (1994).

27 After the Nevada Supreme Court dismissal of the direct appeal, defense counsel did not
inform Petitioner that the appeal had been dismissed, and, in fact, at one time told him the appeal
was pending when it had already been dismissed. See EXHIBIT 1. Unfortunately, WALKER did

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1 not learn of the appeal's dismissal until more than one year had passed from the Supreme Court's
2 Remittitur. This Petition is thereby filed beyond the statutory one (1) year period. However, this
3 delay in filing was not the fault of Petitioner because defense counsel's misinformation constituted
4 ineffective assistance under Strickland, and dismissal of this Petition as untimely will unduly
5 prejudice WALKER. NRS 34.726.

6 **II. INACCURATE STATE DEFINITION OF REASONABLE DOUBT**
7 **EXACERBATED BY ERRONEOUS JURY INSTRUCTIONS VIOLATED**
8 **PETITIONER'S CONSTITUTIONAL RIGHTS AND CONSTITUTED**
9 **REVERSIBLE ERROR**

10 The general rule is that failure to object to asserted errors at trial will bar review of an
11 issue on appeal. Krueger v. State, 92 Nev. 749, 755, 557 P.2d 717, 721 (1976). However, when
12 constitutional questions are raised on appeal, the courts retain the power to address those issues.
13 McCullough v. State, 99 Nev. 72 (issues concerning definition of reasonable doubt are of
14 constitutional dimension, and may still be addressed, even absent objection at trial); Hardison v.
15 State, 84 Nev. 125, 437 P.2d 868 (1968). Here, although no objection was ever offered by
16 defense counsel objecting to the State's improper definition of reasonable doubt, supra, and the
17 Nevada Supreme Court has already determined that defense counsel failed to properly object to
18 Jury Instruction #20 concerning the requisite criminal intent for attempted murder, supra, the two
19 issues are of significant constitutional dimension, thereby allowing appellate review, and
20 constitute reversible error here. McCullough v. State, 99 Nev. at 75 ("We now hold that the
21 disapproved instruction is reversible error when coupled with *any* other attempt to supplement,
22 change, or clarify the statutory reasonable doubt definition.") (emphasis in original).

23 Here, the prosecutor argued the meaning of reasonable doubt in closing argument, using
24 language similar to, or maybe even taken directly from, the disapproved-of jury instruction from
25 McCullough, Page, and Jackson. See ARGUMENT I.B.(3), supra. In those cases, the Court
26 specifically disapproved of the language, "It is not necessary that the defendant's guilt should be
27 established beyond any doubt or to an absolute certainty" in a written criminal jury instruction.

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1 Here, however, the prosecutor said essentially the same words during his closing argument, "You
2 know, you see on court – on T.V. in court, you see people talking about beyond a shadow of a
3 doubt, beyond all imaginary doubt, beyond all possible doubt. That's not the way it is." This
4 prosecution attempt to improperly supplement, clarify, and explain the reasonable doubt standard,
5 though done outside the purview of *written* jury instructions, remains improper and is not allowed
6 under Nevada law. McCullough v. State, 99 Nev. 72; Page v. State, 94 Nev. 386; Jackson v.
7 State, 93 Nev. 677; U.S.C.A. Const. Amend. 4, 5, 6, 14; Nevada Constitution.

8 Both the disapproved of written jury instructions from the aforementioned cases, *and* the
9 improper language argued by the prosecutor here in closing wrongly minimized the reasonable
10 doubt standard, and pursuant to McCullough v. State constitute reversible error whenever
11 coupled with *any* other attempt to alter the definition of reasonable doubt. (Emphasis in
12 Original). It is argued that the improper instruction is more dangerous to the defendant when
13 spoken by the prosecutor as here, than when offered as a written instruction, such as in
14 McCullough. Thus, the prosecutor's act of verbalizing essentially the forbidden written
15 instruction from McCullough, Page, and Jackson during closing argument could constitute
16 reversible error by itself. Holmes v. State, 114 Nev. 1357; McCullough v. State, 99 Nev. 72;
17 Page v. State, 94 Nev. 386; Jackson v. State, 93 Nev. 677; U.S.C.A. Const. Amend. 4, 5, 6, 14;
18 Nevada Constitution.

19 Additionally, in this case, the existence of improper Jury instructions, discussed
20 immediately, *infra*, constitute an additional "alteration attempt" to the proper reasonable doubt
21 standard such as that contemplated under McCullough. Indeed, under the unique facts and
22 circumstances of this case, the reasonable doubt standard is thrown into total disarray because of
23 the confusing, improper jury instructions given here, particularly jury instruction #20, *infra*.
24 Under the instruction #20 as given, the jury could find guilt on the Attempted Murder charge
25 without finding the requisite criminal intent of Christian WALKER for Attempted Murder. Under
26 these instructions, the jury could convict Christian WALKER simply based on the acts of Johnny
27

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1 Walker, yet have existing reasonable doubt with respect to the appropriate specific intent to kill of
 2 Christian Walker. Thus, Christian WALKER's convictions should be reversed. Holmes v. State,
 3 114 Nev. 1357; McCullough v. State, 99 Nev. 72; Sharma v. State, 56 P.3d 868; U.S.C.A.
 4 Const. Amend. 4, 5, 6, 14; Nevada Constitution.

5
 6 **III. ERRONEOUS JURY INSTRUCTIONS VIOLATED PETITIONER'S**
 7 **CONSTITUTIONAL RIGHTS AND CONSTITUTED REVERSIBLE ERROR**

8 In this case, the existence of improper Jury instructions, including particularly Jury
 9 Instruction #20, provide sufficient reversible grounds alone to require WALKER's conviction be
 10 reversed.

11 Jury instruction #20 reads:

12 Where several parties join together in a common design to commit
 13 any unlawful act, each is criminally responsible for the acts of his
 14 confederates committed in furtherance of the common design.
 15 In contemplation of law, the act of one is the act of all.

16 When reading this instruction with, and in light of, all the others, as ordered, including
 17 Instruction #4², it could have been understood by jurors that Christian WALKER is "criminally
 18 responsible" for the all the unlawful acts of Johnny Walker, including namely: Attempted Murder.
 19 Thus, pursuant to this instruction #20, when involved in a common design, the requirement of
 20 intent for Attempted Murder as listed in Instruction #4 becomes no longer a requirement. Indeed,
 21 Instruction #20, when read in conjunction with Instruction #4, can be read as providing for some
 22 type of transferred intent *between confederates*, which is improper and not the law in Nevada.

23 ²Instruction #4 reads:

24 The elements of an attempt to commit murder are:

- 25 1) The intent to commit the murder;
 26 2) Performance of some act towards its commission; and
 27 3) Failure to consummate its commission.

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1 In Sharma v. State, 56 P.3d 868 (Nevada, Oct. 31, 2002), the Nevada Supreme Court
2 clarified Nevada law, and held that a conviction for Attempted Murder under an aider and abettor
3 theory requires proof that the defendant had a specific intent to kill. Likewise, the jury
4 instructions must inform the jury that a finding of a specific intent to kill is required for an
5 Attempted Murder conviction, even under an aiding and abetting theory. Sharma v. State, 56
6 P.3d at 872-873. Thus, Sharma mandates that the instant case be reversed. Id. Instruction #20
7 in the instant case, just like the disapproved of instruction #11 in Sharma, failed to inform the jury
8 that to convict "of aiding and abetting an attempted murder, [the defendant] must have aided and
9 abetted the attempt with the specific intent to kill." Id. at 873.

10 As in Sharma, none of the other instructions given in the instant case cured the faulty
11 instruction. Just like Sharma, instruction #20 here, and all the other instructions read in
12 conjunction, wrongly allow a conviction "based on mere aiding and abetting, or aiding and
13 abetting a battery" when WALKER may have lacked the specific intent to kill. Id. at 873. No
14 instruction presented during the instant case ever informed the jury of the precise mens rea or
15 intent that it must find to convict WALKER of Attempted Murder on a theory of aiding and
16 abetting liability. Indeed, the instructions given in the instant case confused the issue more than
17 clarified it. Because the lack of specific intent of WALKER was consistent with the defense
18 theories offered at trial, Sharma applies, and WALKER's conviction must be reversed. Sharma v.
19 State, 56 P.3d 868.

20
21 **IV. JUROR MISCONDUCT CONSTITUTED REVERSIBLE ERROR.**

22 A state defendant has a federal constitutional right to an impartial jury sworn to make their
23 determination based on the evidence presented. Duncan v. Louisiana, 391 U.S. 145, 149, 88
24 S.Ct. 1444, 1447 (1968). U.S.C.A. Amend. 6, 14. There is also a due process right that
25 guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. Irvin v.
26 Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961); U.S.C.A. Amend. 5, 14. Likewise, the
27

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1 Nevada State Constitution requires a jury of twelve competent men, disinterested and impartial,
2 and free from all bias in favor of or against either party. State of Nevada v. McClear, 11 Nev. 39
3 (1876); Nevada Constitution Art. I, Sec. 3, 8. **"Impartiality is not a technical conception. It is**
4 **a state of mind."** United States v. Wood, 299 U.S. 123, 133, 57 S.Ct. 177, 179 (1936)
5 (emphasis added). And finally, following the above constitutional standards and guidelines, the
6 Nevada legislature has specifically prohibited jurors from declaring facts to other jurors from their
7 own personal knowledge which relate to the case at issue, something that unfortunately appears
8 to have also happened here, when one juror told others about facts he had improperly learned.
9 (TT, 11/5, pp. 8-13, 16-40); NRS 175.121.

10 The bias or prejudice of even a single juror violates a defendant's right to a fair trial.
11 United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977); Dyer v. Calderon, 151 F.3d 970
12 (9th Cir. 1998); United States v. Sarkisian, 197 F.3d 966, 981 (9th Cir. 1999); People v. Nesler,
13 16 Cal. 4th at 578 (1997) (**"it is settled that a conviction cannot stand if even a single juror**
14 **has been improperly influenced"**); Spradlin v. State, 164 P. 990 (Oklahoma 1917) ("A fair and
15 impartial jury is not had by 11 impartial men and one man shown to be prejudiced"); U.S.C.A.
16 Amend. 5, 6, 14. The presence of a biased juror requires a new trial for the convicted defendant
17 without a showing of actual prejudice, See United States v. Allsup, 566 F.2d at 71 (9th Cir. 1977),
18 because the presence of such juror cannot be deemed harmless. Dyer v. Calderon, 151 F.3d 970.
19 The presence of a biased juror introduces a structural defect not subject to harmless error analysis.
20 See Arizona v. Fulminante, 499 U.S. 279, 307-310, 111 S.Ct. 1246 (1991).

21 Here, the trial proceedings began on Monday, November 2, 1998 with immediate initial
22 concern about the jury being infected with knowledge that Mr. Christian WALKER was facing
23 another trial, a murder trial, proceedings going on at the same time in front of Judge Mosley in
24 Department XIV. (TT, 11/2, p. 3). A mistrial request was ultimately made on these exact
25 grounds. (TT, 11/5, p.37). Indeed, it was ultimately determined that these initial concerns of jury
26 infection and bias were absolutely legitimate when the Honorable Judge McGroarty's secretary
27

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1 Rene Edwards overheard Juror #8 admit that he knew that Christian WALKER was also facing a
2 different murder trial in another court, even pointing to the exact courtroom where he believed
3 the other trial was being held. (TT, 11/5, pp. 8-9). Juror #8's bias was thus revealed.

4 Juror #8 was ultimately questioned by the Court, and his answers were revealed to be self-
5 serving and untruthful when compared to the answers given by the other eleven questioned jurors,
6 further revealing Juror #8's likely bias. (TT, 11/5, pp. 8-13, 16-37). Most obviously, Juror #3
7 clearly indicated that he had to make a concerted effort to avoid discussion during juror
8 deliberations about what Juror #8 had revealed to the jury as a whole. (TT, 11/5, p.22). Thus,
9 the case at bar appears to be a clear case involving actual juror bias. The bias of a juror may be
10 actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law.
11 United States v. Wood, 299 U.S. 123, 133. Actual bias is present when a juror's views "prevent
12 or substantially impair the performance of his duties as a juror in accordance with his instruction
13 and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852 (1985). *The term*
14 *"actual bias" may include a state of mind resulting from a juror's actually being influenced*
15 *by extraneous information about a party.* People v. Nesler, 16 Cal. 4th 561, 581, 941 P.2d 87,
16 101 (emphasis added). Here, Juror #8 learned the extraneous information concerning another
17 pending murder trial of Christian WALKER, and such information obviously influenced him,
18 explaining his actions and admissions in front of secretary Renee Edwards that ultimately brought
19 his misconduct to the light of day. (TT, 11/5, pp. 8-9).

20 The actions of Juror #8 here required a mistrial, and now demand the reversal of Christian
21 WALKER's conviction. People v. Nesler, 16 Cal. 4th at 581 ("A sitting juror's actual bias . . .
22 renders the juror unable to perform his or her duties and thus subject to discharge."). Juror #8
23 sitting in judgment in this case constituted reversible error. U.S.C.A. Const. Amend. 5, 6, 14;
24 Nevada Constitution Art. I, Sec. 3, 8. More is at stake here than the rights of Appellant. "Justice
25 must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11
26 (1954). Because Juror #8's presence here cannot be deemed harmless, the law of Nevada and the
27

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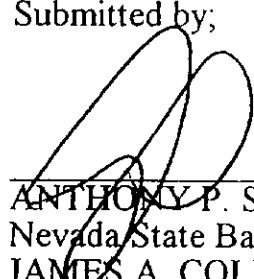
1 United States mandate Petitioner WALKER's convictions be reversed. State of Nevada v.
2 McClear, 11 Nev. 39; United States v. Hendrix, 549 F.2d 1225; Dyer v. Calderon, 151 F.3d 970;
3 United States v. Sarkisian, 197 F.3d 966; People v. Nesler, 16 Cal. 4th at 578 (1997); U.S.C.A.
4 Const. Amend. 4, 5, 6, 14; Nevada Constitution Art. I, Sec. 3, 8.

CONCLUSION

7 **WHEREFORE**, based upon the foregoing reasons, and pursuant to the United States and
8 Nevada Constitutions, Petitioner WALKER respectfully requests this Honorable Court reverse
9 the convictions imposed against him.

11 **DATED** this 14 day of July, 2003.

Submitted by;



ANTHONY P. SGRO, ESQ.
Nevada State Bar #3811
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Nevada State Bar #6257
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(702) 385-9595
Attorneys for Petitioner
CHRISTIAN WALKER

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RECEIPT OF COPY AND CERTIFICATE OF MAILING

RECEIPT OF COPY

RECEIPT OF A COPY of the above Points and Authorities in support of Petition for Writ of Habeas Corpus (Post-Conviction) is hereby acknowledged this ____ day of July, 2003.

DAVID ROGER
District Attorney

BY: _____

200 South Third Street
Las Vegas, Nevada 89101

I HEREBY CERTIFY that on the 14th day of July, 2003, I placed a copy of the above POINTS AND AUTHORITIES regarding the above-captioned matter, into a sealed envelope and deposited same in the Post Office in the City of Las Vegas, County of Clark, State of Nevada, with postage prepaid, directed to

E.K. McDANIEL
Warden, Ely State Prison
P.O. Box 1989
Ely, NV 89301

Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701-4717


AN EMPLOYEE OF PATTI & SGRO

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FILED

8/21/03

0001

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
FRANK JOHAN COUMOU
Chief Deputy District Attorney
Nevada Bar #004577
200 South Third Street
Las Vegas, Nevada 89155-2211
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CHRISTIAN DORAN WALKER,
#1507623

Defendant.

Case No. C146419

Dept No. XVI

NOTICE OF MOTION AND MOTION TO DISMISS DEFENDANT'S PETITION
FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: 9/8/03

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
FRANK JOHAN COUMOU, Chief Deputy District Attorney, and files this Notice of
Motion and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus.

This Motion is made and based upon all the papers and pleadings on file
hercin, the attached points and authorities in support hereof, and oral argument at the time of
hearing, if deemed necessary by this Honorable Court.

NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned
will bring the foregoing motion on for setting before the above entitled Court, in Department

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XVI thereof, on Monday, the 8th day of September, 2003, at the hour of 9:00 o'clock A.M.,
or as soon thereafter as counsel may be heard.

DATED this _____ day of August, 2003.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY



FRANK JOHAN GOUMOU
Chief Deputy District Attorney
Nevada Bar #004577

STATEMENT OF THE CASE

Christian Walker, hereinafter Defendant, was convicted by a jury of one count of
Attempt Murder with Use of a Deadly Weapon on November 5, 1998.

On January 5, 1999, Defendant was sentenced to a maximum of one hundred twenty
(120) months and a minimum of forty eight (48) months in the Nevada Department of
Corrections, and an equal and consecutive maximum of one hundred twenty (120) months
and a minimum of forty eight (48) months for the weapons enhancement. Defendant also
received 453 days credit for time served.

On January 20, 1999, Defendant filed a Notice of Appeal to the Nevada Supreme
Court.

On June 21, 1999, the Nevada Supreme Court filed an Order Dismissing Appeal. The
Remittitur is dated July 19, 1999.

On July 14, 2003, Defendant filed the instant Petition for Writ of Habeas Corpus
(Post-conviction).

ARGUMENT

1. Defendant's Petition Is Barred By NRS 34.726(1)-One Year Time Bar

NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that
challenges the validity of a judgment or sentence must be filed within one (1) year after entry

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1 of the judgment of conviction or, if an appeal has been taken from the judgment, within one
2 (1) year after the Supreme Court issues its remittitur." In this case, Defendant did not file
3 the present Petition for Writ of Habeas Corpus until July 14, 2003, almost four (4) years after
4 the filing of the Remittitur on July 19, 1999. Therefore, Defendant's petition is untimely,
5 procedurally barred and must be dismissed.

6 **2. Defendant Has Not Shown Good Cause To Overcome Procedural Bars**

7 The Defendant has failed to demonstrate good cause existed to excuse the procedural
8 time bar. In Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997) the Nevada Supreme
9 Court held that "[i]n order to show 'cause,' a petitioner must show an impediment external to
10 the defense which prevented him from complying with the state procedural default rules"
11 citing Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). See
12 also Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) and Ford v. Warden, 111
13 Nev. 872, 879, 901 P.2d 123, 127 (1995).

14 Now that his attorney is dead and unable to refute Defendant's allegations, Defendant
15 makes a belated and self-serving claim (well over two years after defense counsel's death on
16 March 9, 2001) that he wasn't notified that his direct appeal had been dismissed.

17 First, Defendant's contention is a mere bare and naked allegation, an unpersuasive
18 ipse dixit, that is not supported by any evidence other than his own self-serving and
19 suspiciously untimely affidavit.

20 Second, even if Defendant's counsel failed to notify the Defendant that his direct
21 appeal had been dismissed, that does not amount to an "impediment external to the defense"
22 and consequently does not constitute good cause to excuse the procedural time bar.

23 A Defendant does not have a federal or state constitutional right to counsel in post-
24 conviction relief proceedings. Coleman v. Thompson, 501 U.S. 722, 725, 111 S.Ct. 2546,
25 2552 (1991); McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996). Where
26 there is no right to counsel, there is no right to effective counsel. In Coleman, 501 U.S. at
27 754, 111 S.Ct. at 2567, the United States Supreme Court stated "As between the State and
28 the petitioner, it is the petitioner who must bear the burden of a failure to follow state

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procedural rules.” The Nevada Supreme Court reached a similar conclusion in Crump v. Warden, 113 Nev. 293, 304, 934 P.2d 247, 253 (1997) when, citing Coleman, it stated, “mere attorney error, not rising to the level of ineffective assistance of counsel, such as attorney ignorance or inadvertence, “is not ‘cause’ because the attorney is the petitioner’s agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must “bear the risk of attorney error.””

Third, as the Nevada Supreme Court stated in Hathaway v State, 119 Nev. 30, 71 P.3d 503 (2003), “In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules. An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel, or that ‘some interference by officials’ made compliance impracticable.” In the case at bar there was absolutely no interference by officials and the basis for Defendant’s claim (that his counsel was ineffective) was available during the statutory time period. In short, there is no evidence of an impediment external to the defense.

As the Nevada Supreme Court noted in Hathaway, 71 P.3d at 506, “A claim or allegation that was reasonably available to petitioner during the statutory time period would not constitute good cause to excuse the delay.” Defendant’s claim of ineffective assistance of counsel was available during the statutory time period.

3. District Courts Must Enforce Procedural Bars

Legislatively mandated procedural bars are not simply a legal technicality. They serve a vital role in maintaining the viability of the criminal justice system.

“[R]easonable adherence to clear, reasonable and known rules of procedure is essential to the administration of justice. Justice cannot be administered in chaos. Moreover the administration of justice involves not only meticulous disposition of the conflicts in one particular case but the expeditious disposition of hundreds of cases. If the courts must stop to inquire where substantial justice on the merits lies every time a litigant refuses or fails to abide the reasonable and known rules of procedure, there will be no administration of justice. Litigants must be required to cooperate in the efficient disposition of their cases.”

United States v. Seigel, 168 F.2d 143 (D.C., 1948)

APP. 170

1 As the Nevada Supreme Court noted in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519
2 (2001), "the legislative history of the habeas statutes shows that Nevada's lawmakers never
3 intended for petitioners to have multiple opportunities to obtain post-conviction relief absent
4 extraordinary circumstances." Furthermore, legislative imposition of statutory time limits
5 "evinces intolerance toward perpetual filing of petitions for relief, which clogs the court
6 system and undermines the finality of convictions." Id. Defendants are entitled to "one time
7 through the system absent extraordinary circumstances" Id.

8 "Where the intention of the Legislature is clear, it is the duty of the court to give
9 effect to such intention and to construe the language of the statute so as to give it force and
10 not nullify its manifest purpose." Woofter v. O'Donnell, 91 Nev. 756, 762, 542, P.2d 1396,
11 1400 (1975). Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983).

12 Nevada courts, and the Nevada Supreme Court in particular, have been under regular
13 attack by petitioners who claim Nevada does not consistently apply its procedural bars. See,
14 e.g., Loveland v. Hatcher, 231 F.3d 640 (9th Cir. 2000) (denying claim made that Nevada
15 does not consistently apply NRS 34.726(1), the one year limit for filing habeas petition).
16 These attacks have continued even though both the Nevada Supreme Court and the Ninth
17 Circuit have recently ruled that "a petitioner must establish 'good cause' and 'actual
18 prejudice' to overcome a post conviction procedural bar." Valerio v. State, 112 Nev. 383,
19 390, 915 P.2d 874 (1998); Loveland, supra. As long as the State rules are consistently
20 applied, the federal courts must show deference to the State court's application of procedural
21 bars. Loveland, supra. In Petrocelli v. Angelone, 248 F.3d 877 (9th Cir, 2001) the Ninth
22 Circuit Court of Appeals, citing its earlier decision in Moran v. McDaniel, 80 F.3d 1261 (9th
23 Cir, 1996) found that the Nevada Supreme Court had consistently applied the procedural bar
24 in NRS 34.800.

25 The United States Supreme Court has also addressed the importance of procedural
26 bars. In Bousley v. United States, 523 U.S. 614, 629, 118 S.Ct. 1604, 1614 (1998), the
27 Court stated "No criminal law system can function without rules of procedure conjoined
28 with a rule of finality."

APP. 171

1 In Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986), the United States Supreme
2 Court stated that "A State's procedural rules serve vital purposes on appeal as well as at trial
3 and on state collateral attack, and the standard for cause should not vary depending on the
4 timing of a procedural default." The Court went on to say "Attorney error short of
5 ineffective assistance of counsel does not constitute cause for a procedural default even
6 when that default occurs on appeal rather than at trial. To the contrary, cause for a
7 procedural default on appeal ordinarily requires a showing of some external impediment
8 preventing counsel from constructing or raising the claim. Murray, 477 U.S. at 492, 106
9 S.Ct. at 2648.

10 Finally, in United States v. Timmreck, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087
11 (1979), the United States Supreme Court stated that "Every inroad on the concept of finality
12 undermines confidence in the integrity of our procedures; and, by increasing the volume of
13 judicial work, inevitably delays and impairs the orderly administration of justice.

14 The dismissal of Defendant's petition properly supports the consistent application of
15 procedural time bars as well as the concerns of both the Nevada Supreme Court and the
16 United States Supreme Court with the finality of convictions.

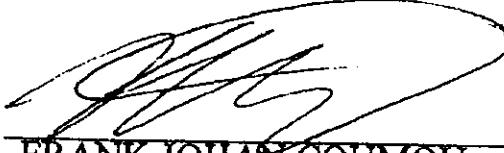
CONCLUSION

17
18 Based upon the foregoing, the State respectfully requests that Defendant's Petition for
19 Writ of Habeas Corpus (Post-conviction) be dismissed.

20 DATED this 10 day of August, 2003.

21 DAVID ROGER
22 Clark County District Attorney
23 Nevada Bar #002781

24 BY


25 FRANK JOHAN COUMOU
26 Chief Deputy District Attorney
27 Nevada Bar #004577
28

APP. 172

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of NOTICE OF MOTION AND MOTION TO DISMISS
DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS, was made this 20
day of August, 2003, by facsimile transmission to:

ANTHONY SGRO, ESQ.
FAX#386-2737

BY M. B.
Employee of the District Attorney's Office

mb

APP. 173

1 ANTHONY P. SGRO, ESQ.
Nevada State Bar #3811
2 JAMES A. COLIN, ESQ.
Nevada State Bar #6257
3 PATTI & SGRO
300 East Charleston Blvd., Suite 105
4 Las Vegas, Nevada 89104
(702) 385-9595
5 Attorneys for Petitioner
CHRISTIAN WALKER

SEP 17 11 14 AM '03

Shirley A. ...
CLERK

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

* * * * *

10 CHRISTIAN D. WALKER,

11 Petitioner

Case No. C146419

12 vs.

Dept. No. XVI

13 E.K. McDANIEL, WARDEN, and
14 THE STATE OF NEVADA,

15 Respondents.

16
17 **OPPOSITION TO STATE'S MOTION TO DISMISS**
18 **PETITION FOR WRIT OF HABEAS CORPUS**
(POST-CONVICTION)

19 **(EVIDENTIARY HEARING REQUESTED)**

20 COMES NOW, Petitioner CHRISTIAN D. WALKER, by and through his attorneys,
21 ANTHONY P. SGRO and JAMES A. COLIN of PATTI & SGRO, and files this Opposition to
22 the State's Motion to Dismiss the Petition.

23
24 **LEGAL ARGUMENT**

25 The one-year time limit for filing a post-conviction Habeas Petition may be excused by a
26 showing of good cause and prejudice. NRS 34.726(1). In this case, such good cause and
27 prejudice clearly exists. The recent Nevada Supreme Court case Hathaway v. State, 119 Nev. 30,
71 P.3d 503 (June 26, 2003), is directly on point and controlling on this matter. Here, as alleged

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1 in the Affidavit attached to this Opposition and the original Petition, Petitioner Christian
2 WALKER honestly and reasonably believed in good faith that his direct appeal was still being
3 pursued and pending with the Nevada Supreme Court when his attorney John Fadgen died in
4 March 2001. Indeed, sometime in 2000, Mr. Fadgen affirmatively *told* Mr. WALKER that the
5 appeal was still pending, and the Nevada Supreme Court had not yet rendered a decision. See
6 EXHIBIT 1 - Affidavit of Christian Walker. Not until *after* Mr. Fadgen's death in 2001 did Mr.
7 WALKER finally learn that the appeal had, in fact, been dismissed back in June, 1999. Indeed,
8 the essential facts in the instant case are remarkably similar to the facts in Hathaway, where a
9 similar delay was held to be good cause to excuse late filing of the Petition. Hathaway v. State,
10 71 P.3d at 503.

11 The Nevada Supreme Court in Hathaway held that a Petitioner can establish good cause
12 for the delay in filing under NRS 34.726(1) if the Petitioner establishes (1) he actually and
13 reasonably believed his counsel was pursuing his direct appeal, and (2) that the petitioner filed his
14 habeas corpus petition within a reasonable time after he should have known that his counsel was
15 not pursuing his direct appeal. Hathaway v. State, 71 P.3d at 507-508. Again, WALKER
16 honestly believed his appeal was being pursued and was still pending at the time of Mr. Fadgen's
17 death in 2001, because Mr. Fadgen *told* WALKER in 2000 that the appeal was still pending. See
18 EXHIBIT 1. Exactly like the Nevada Supreme Court and the Ninth Circuit Court of Appeals
19 recognized: "if a defendant reasonably believes that his counsel is pursuing his direct appeal he
20 most naturally will not file his own post-conviction petition." Hathaway v. State, 71 P.3d at 507;
21 Loveland v. Hatcher, 231 F.3d 640 (9th Cir. 2000). Just like in Hathaway, defense counsel here
22 affirmatively indicated that he was pursuing an appeal on Petitioner's behalf. After the dismissal
23 of the appeal, defense counsel Fadgen affirmatively indicated to WALKER that the appeal was
24 still being pursued and remained pending. See EXHIBIT 1. This assertion in 2000 by defense
25 counsel Fadgen clearly makes WALKER's belief objectively reasonable, and satisfies the first
26 prong of the Hathaway test.

27

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1 In 2001, immediately after learning that the appeal had actually been dismissed in 1999,
2 Mr. WALKER promptly contacted the undersigned to protect his rights. This honorable court
3 then properly appointed the undersigned in August, 2001 to investigate and pursue all post-
4 conviction remedies in this case. Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Defense
5 counsel vigorously investigated and pursued this matter, and then filed the instant Petition in July,
6 2003 after vital and controlling Nevada and 9th Circuit caselaw had developed. See e.g. Sharma v.
7 State, 56 P.3d 868 (Nevada, Oct. 31, 2002) (a conviction for Attempted Murder under an aider
8 and abettor theory requires proof that the defendant had a specific intent to kill). This delay by
9 counsel was a strategic decision *after* appointment of counsel, and WALKER should certainly not
10 be penalized for this additional delay which was necessary to protect his rights, and not his fault.
11 Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995); U.S.C.A. Const. Amend. 4, 5,
12 6, 14.

13 WALKER did not learn until *after* Mr. Fadgen's death that the appeal was not being
14 pursued, and, thus, the State is not prejudiced in any way by the delay here. There is *not* a
15 presumption of prejudice to the State until five (5) years have passed, and even including the
16 delay of counsel, less than four (4) years have passed here, similar to the filing delay of three (3)
17 years in Hathaway. NRS 34.800(2). Indeed, there is no prejudice at all to the State under the
18 specific facts and circumstances of this case, and a retrial comporting with Nevada law could
19 easily be held. U.S.C.A. Const. Amend. 4, 5, 6, 8, 14; Nevada Constitution; NRS 34.800(1). It
20 is clear that under these unique factual circumstances, WALKER filed the instant post-conviction
21 Habeas Corpus petition in a reasonable time after he learned his appeal had been dismissed.
22 Hathaway v. State, 71 P.3d at 508; See EXHIBIT 1. Thus, the second Hathaway prong is
23 satisfied, and because WALKER has raised claims supported by specific facts not belied by the
24 record entitling him to relief, an evidentiary hearing must be held to, inter alia, determine whether
25 the asserted good cause exists to excuse the delay in filing WALKER's petition. Hathaway v.
26 State, 71 P.3d at 508.

27

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1 Likewise, in addition to the above controlling law, errors by defense counsel that rise to
2 the level of ineffective assistance establish cause and prejudice to excuse any default under NRS
3 34.726 and NRS 34.810(1)(b). Coleman v. Thompson, 501 U.S. 722, 753-54, 111 S.Ct. 2546,
4 2566-67 (1991); Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); Stewart v. Warden, 92
5 Nev. 588, 589, 555 P.2d 218, 219 (1976). Defense counsel's conduct on direct appeal
6 constituted ineffective assistance here and provides additional "good cause" to excuse default
7 under these circumstances. Crump v. Warden, 113 Nev. at 293; Stewart v. Warden, 92 Nev. at
8 588. The delay in filing was not the fault of Petitioner because defense counsel's misinformation
9 constituted ineffective assistance under Strickland, and dismissal of this Petition as untimely will
10 unduly prejudice WALKER. NRS 34.726. Absolutely contrary to the State's assertion,
11 WALKER's claim of ineffective assistance was not reasonably available during the one-year
12 statutory time period. Hathaway v. State, 71 P.3d at 506; See EXHIBIT 1.

15 ///

16 ///

18 ///

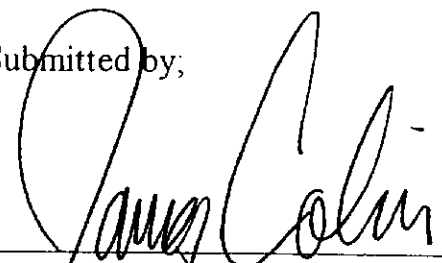
APP. 177

CONCLUSION

WHEREFORE, based upon all the foregoing reasons, and pursuant to the recent Nevada Supreme Court case Hathaway v. State, 119 Nev. 30, 71 P.3d 503 (2003), Petitioner WALKER respectfully requests an evidentiary hearing to prove his claims, and asks that this Honorable Court reverse the convictions imposed against him.

DATED this 15th day of September, 2003.

Submitted by,



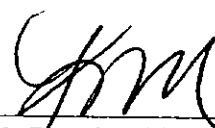
ANTHONY P. SGRO, ESQ.
Nevada State Bar #3811
JAMES A. COLIN, ESQ.
Nevada State Bar #6257
300 East Charleston Blvd., Suite 105
Las Vegas, Nevada 89104
(702) 385-9595

APP. 178

RECEIPT OF COPY

RECEIPT OF A COPY of the above Opposition to State's Motion to Dismiss is hereby
acknowledged this 17 day of September, 2003.

DAVID ROGER
District Attorney

BY: 

200 South Third Street
Las Vegas, Nevada 89101

APP. 179

EXHIBIT 1
(Affidavit of Christian Walker)

**AFFIDAVIT OF CHRISTIAN DORAN WALKER IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

STATE OF NEVADA)

COUNTY OF CLARK)

ss

CHRISTIAN DORAN WALKER, having first been duly sworn, deposes, and states:

1. That your affiant was previously represented at trial and on direct appeal in this matter by attorney JOHN P. FADGEN, ESQ. beginning in October 1997.

2. That your affiant makes this Affidavit in support of his Writ of Habeas Corpus (Post-Conviction) for Case #C146419, Eighth Judicial District Court, Clark County, Nevada.

3. That your affiant has full knowledge of all matters contained herein and is competent to testify thereto.

4. That your affiant spoke with defense counsel Mr. Fadgen after I was convicted in this matter, and I expressed to Mr. Fadgen that I wanted all meritorious issues to be argued in my direct appeal, including the Jury Misconduct issues on which he made Mistrial requests during trial.

5. That your affiant later learned that only one issue was argued in the filed direct appeal, and that no arguments were made concerning the Juror Misconduct issues, all expressly contrary to your affiant's earlier expressed desires and discussions with Mr. Fadgen.

6. That sometime during the year 2000, your affiant had a hearing in an unrelated Justice Court proceeding where he was also represented by Mr. Fadgen, and spoke with Mr. Fadgen concerning the status of the direct appeal that filed in this case.

7. That during the discussion referred to in paragraph 6, your affiant was told by Mr. Fadgen that the appeal was still pending, and had not yet been ruled on by the Nevada Supreme Court.

8. That after Mr. Fadgen died in March 2001, your affiant later learned for the first time that the Nevada Supreme Court appeal had been dismissed back in 1999.

APP. 181

1 9. That your affiant and others were aware before trial that the co-defendant in the case, my
2 cousin Johnny Walker, had mailed a signed letter to John Fadgen where he confessed to the crime,
3 offered to testify on my behalf, and admitted that I was not involved in any of his planning, and had
4 not in any way aided him in the crime he committed.
5

6 10. That well before trial in this case, your affiant had seen the letter referred to in Paragraph
7 9 in John Fadgen's possession, and had also discussed the letter with John Fadgen concerning his
8 intentions for the letter at trial.

9 11. That at trial John Fadgen did not introduce the letter referred to in Paragraph 9 into
10 evidence, or call Johnny Walker to testify as a witness on my behalf.
11

12 12. That Mr. Fadgen did not want me to testify at trial, and told me the reason was that if
13 I testified, evidence concerning another murder trial I was facing would be introduced into evidence
14 to impeach my testimony in this case.

15 13. That on the last day of trial, I insisted on testifying despite what Mr. Fadgen had told me,
16 and Mr. Fadgen then threatened to immediately withdraw from my case unless I chose not to testify.
17 Because the trial was almost over, and I was concerned about my representation, and how everything
18 would look to the jurors who held my future in their hands, I acquiesced to Mr. Fadgen's threat, and,
19 under such duress, did not testify at trial.
20

21 FURTHER YOUR AFFIANT SAYETH NAUGHT.

22 Under the Penalty of Perjury pursuant to N.R.S. 208.165, the above Affidavit is true and
23 correct to the best of my knowledge.
24

25 DATED this 11 day of June, 2003.
26

27 Christian Walker
28 CHRISTIAN DORAN WALKER

APP. 182

● ORIGINAL ●

16

1 ORDER

2 DAVID ROGER

3 Clark County District Attorney

4 Nevada Bar #002781

5 STACY KOLLINS

6 Chief Deputy District Attorney

7 Nevada Bar #005391

8 200 South Third Street

9 Las Vegas, Nevada 89155-2211

10 (702) 455-4711

11 Attorney for Plaintiff

FILED

OCT 6 4 15 PM '03

Shirley B. Longine
CLERKDISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 CHRISTIAN D. WALKER,
12 #1507623

13 Defendant.

CASE NO: C146419

DEPT NO: XVI

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

16 DATE OF HEARING: 9/23/03

17 TIME OF HEARING: 9:00 A.M.

18 THIS CAUSE having come on for hearing before the Honorable John McGroarty,
19 District Judge, on the 23rd day of September, 2003, the Petitioner not being present,
20 represented by JAMES COLIN, Esquire, the Respondent being represented by DAVID
21 ROGER, District Attorney, by and through STACY KOLLINS, Chief Deputy District
22 Attorney, and the Court having considered the matter, including briefs, transcripts,
23 arguments of counsel, and documents on file herein, now therefore, the Court makes the
24 following findings of fact and conclusions of law:

25 FINDINGS OF FACT

- 26 1. Christian Walker, hereinafter Defendant, was convicted by a jury of one count of
27 Attempt Murder with Use of a Deadly Weapon on November 5, 1998.
28 2. On January 5, 1999, Defendant was sentenced to a maximum of one hundred twenty

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OCT 16 2003

COUNTY CLERK

(120) months and a minimum of forty eight (48) months in the Nevada Department of Corrections, and an equal and consecutive maximum of one hundred twenty (120) months and a minimum of forty eight (48) months for the weapons enhancement. Defendant also received 453 days credit for time served.

3. On January 20, 1999, Defendant filed a Notice of Appeal to the Nevada Supreme Court. On June 21, 1999, the Nevada Supreme Court filed an Order Dismissing Appeal. The Remittitur is dated July 19, 1999.

4. On July 14, 2003, Defendant filed the instant Petition for Writ of Habeas Corpus (Post-conviction), well over two years after defense counsel's death on March 9, 2001, and almost four (4) years after the filing of the Remittitur on July 19, 1999.

5. Defendant's petition is barred by NRS 34.726(1), the one year time bar.

6. Defendant has not shown good cause to overcome procedural bars.

7. Defendant has not shown he suffered any impediment external to the defense.

8. The dismissal of Defendant's petition properly supports the consistent application of procedural time bars as well as the concerns of both the Nevada Supreme Court and the United States Supreme Court with the finality of convictions.

CONCLUSIONS OF LAW

1. NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within one (1) year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one (1) year after the Supreme Court issues its remittitur." This court has determined that pursuant to NRS 34.770, Defendant's petition does not merit an evidentiary hearing, so there is no need to transport the Defendant.

2. In Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997) the Nevada Supreme Court held that "[i]n order to show 'cause,' a petitioner must show an impediment external to the defense which prevented him from complying with the state procedural default rules" citing Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). See also Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) and

1 Ford v. Warden, 111 Nev. 872, 879, 901 P.2d 123, 127 (1995).

2 3. A Defendant does not have a federal or state constitutional right to counsel in post-
3 conviction relief proceedings. Coleman v. Thompson, 501 U.S. 722, 725, 111 S.Ct.
4 2546, 2552 (1991); McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58
5 (1996). Where there is no right to counsel, there is no right to effective counsel. In
6 Coleman, 501 U.S. at 754, 111 S.Ct. at 2567, the United States Supreme Court stated
7 "As between the State and the petitioner, it is the petitioner who must bear the burden
8 of a failure to follow state procedural rules." The Nevada Supreme Court reached a
9 similar conclusion in Crump v. Warden, 113 Nev. 293, 304, 934 P.2d 247, 253
10 (1997) when, citing Coleman, it stated, "mere attorney error, not rising to the level of
11 ineffective assistance of counsel, such as attorney ignorance or inadvertence, "is not
12 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in
13 furtherance of the litigation, and the petitioner must "bear the risk of attorney error.""

14 As the Nevada Supreme Court stated in Hathaway v State, 119 Nev. 30, 71 P.3d 503
15 (2003), "In order to demonstrate good cause, a petitioner must show that an impediment
16 external to the defense prevented him or her from complying with the state procedural
17 default rules. An impediment external to the defense may be demonstrated by a showing
18 'that the factual or legal basis for a claim was not reasonably available to counsel, or that
19 'some interference by officials' made compliance impracticable." The Nevada Supreme
20 Court also noted in Hathaway, 71 P.3d at 506, "A claim or allegation that was reasonably
21 available to petitioner during the statutory time period would not constitute good cause to
22 excuse the delay."

23 //

24 //

25 //

26 //

27 //

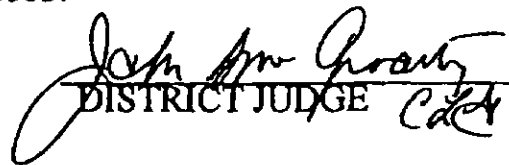
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APP. 185

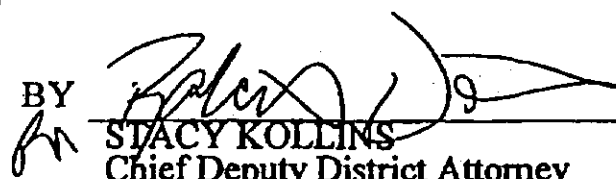
ORDER

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

DATED this 6 day of October, 2003.


DISTRICT JUDGE *Cd*

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY 

STACY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391

mb

APP. 186

1 NOED

2 District Court

3 Clark County, Nevada

4 CHRISTIAN D. WALKER,

5 Petitioner,

7 vs

9 THE STATE OF NEVADA,

10 Respondent.

Case No. C146419

Dept. No. XVI

NOTICE OF ENTRY OF
DECISION AND ORDER

11 PLEASE TAKE NOTICE that on October 6, 2003, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal,
14 you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this
15 notice is mailed to you. This notice was mailed on October 20, 2003.

16 SHIRLEY B. PARRAGUIRRE, CLERK OF COURT

17 By: Norreta Caldwell
18 Norreta Caldwell, Deputy Clerk

19 CERTIFICATE OF MAILING

20 I hereby certify that on the 20 day of October, 2003, I placed a copy of
21 this Notice of Entry of Decision and Order in:

22 The bin(s) located in the Office of the County Clerk of:
23 Clark County District Attorney's Office - Appellate Division
24 Attorney General's Office - Appellate Division

25 ☐ The United States mail addressed as follows:

26 Attorney - James Colin
27 300 E Charleston Blvd #105
28 Las Vegas, Nv 89104

Norreta Caldwell
Norreta Caldwell, Deputy Clerk

FILED

OCT 20 10 26 AM '03

Shirley B. Parraguirre
CLERK

APP. 187

1 ANTHONY P. SGRO, ESQ.
 Nevada State Bar #3811
 2 PATTI & SGRO
 300 East Charleston Blvd., Suite 105
 3 Las Vegas, Nevada 89104
 (702) 385-9595
 4 Attorneys for Petitioner
CHRISTIAN WALKER

FILED

OCT 28 1 22 PM '03

Shirley B. Thompson
 CLERK

DISTRICT COURT
 CLARK COUNTY, NEVADA

* * *

CHRISTIAN D. WALKER,

Petitioner

Case No. C146419

vs.

Dept. No. XVI

E.K. McDANIEL, WARDEN, and
THE STATE OF NEVADA,

Respondents.

NOTICE OF APPEAL TO SUPREME COURT

TO: STATE OF NEVADA, Plaintiff;

TO: DAVID ROGER, District Attorney;

COMES NOW, Defendant, CHRISTIAN D. WALKER, by and through his undersigned attorneys, PATTI & SGRO, and does hereby appeal from the Order first announced in the District Court on the 23rd day of September, 2003, and then filed October 6th, 2003, to the Nevada Supreme Court.

DATED this 28th day of October, 2003.

PATTI & SGRO

Anthony P. Sgro
 ANTHONY P. SGRO, ESQ.
 Nevada Bar #003811
 300 East Charleston Blvd., Suite 105
 Las Vegas, Nevada 89104
 Attorneys for Defendant/Appellant

74

APP. 188

CERTIFICATE OF MAILING

I hereby certify that on the 28 day of October, 2003, I served a copy of the foregoing Notice of Appeal upon each of the parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, and addressed to:

David Roger
District Attorney
200 S. Third Street
Las Vegas, Nevada 89155

and that there is a regular communication by mail between the place of mailing and the place(s) so addressed.


an employee of Patti & Sgro

APP. 189

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN D. WALKER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 42292

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada
2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

James Tufteland
Clark County District Attorney's Office
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4843

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None

5. Procedural history.

Christian Walker, hereinafter Defendant, was convicted by a jury of one count of Attempt Murder with Use of a Deadly Weapon on November 5, 1998. On January 5, 1999, Defendant was sentenced to a maximum of one hundred twenty (120) months and a minimum of forty eight (48) months in the Nevada Department of Corrections,

APP. 190

1 and an equal and consecutive maximum of one hundred twenty (120) months and a
2 minimum of forty eight (48) months for the weapons enhancement. Defendant also
3 received 453 days credit for time served.

4 On January 20, 1999, Defendant filed a Notice of Appeal to the Nevada
5 Supreme Court. On June 21, 1999, the Nevada Supreme Court filed an Order
6 Dismissing Appeal. The Remittitur is dated July 19, 1999. On July 14, 2003,
7 Defendant filed a Petition for Writ of Habeas Corpus (Post-conviction). The court
8 denied the petition, and Defendant now files the instant appeal.

9 **6. Statement of facts.**

10 Defendant filed his Petition for Writ of Habeas Corpus four years after the
11 issuance of the remittitur of his appeal. To show good cause, Defendant claims in his
12 petition and the instant Fast Track Statement that his attorney told him his appeal was
13 still pending after it had been dismissed. (Fast Track Statement (FTS) p. 5). He
14 alleges that, when his attorney died in March 2001, Defendant began to suspect that
15 his appeal was no longer pending. (FTS p. 5). He further alleges that he did not
16 actually find out about the dismissal of his appeal until May 2001, almost two years
17 after its dismissal. (FTS p. 5). Defendant attaches no documents, affidavits, or
18 records to substantiate such claims, except for a self-serving affidavit. Anthony Sgro
19 was appointed as counsel for Defendant on August 13, 2001, after Defendant
20 contacted him and Mr. Sgro requested that he be appointed. (FTS p. 6). Counsel
21 spent two years "researching, writing, and awaiting important Nevada and 9th Circuit
22 constitutional caselaw to develop", and finally filed the petition on July 14, 2003.
23 (FTS p. 6).

24 **7. Issue on appeal.**

25 Whether the district court properly denied Defendant's Petition for Writ of
26 Habeas Corpus for untimeliness and lack of good cause.

1 8. **Legal Argument, including authorities:**

2 **I. DEFENDANT'S PETITION WAS PROPERLY DENIED**
3 **BECAUSE IT IS SUPPORTED ONLY BY BARE, NAKED**
4 **CLAIMS FOR RELIEF.**

5 NRS 34.370(4) applies to petitions for writs of habeas corpus, and requires that,
6 "[a]ffidavits, records or other evidence supporting the allegations in the petition must
7 be attached unless the petition recites the cause for failure to attach these materials."
8 In Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Court held
9 that claims asserted in a petition for post-conviction relief must be supported with
10 specific factual allegations which, if true, would entitle the defendant to relief. "Bare"
11 and "naked" allegations are not sufficient, nor are those belied and repelled by the
12 record. Id.

13 Now that his attorney is dead and unable to refute Defendant's allegations,
14 Defendant makes a belated and self-serving claim (well over two years after defense
15 counsel's death in March 2001) that his attorney told him his appeal was still pending
16 after it had already been dismissed. Other than the Defendant's self-serving affidavit,
17 he has not complied with NRS 34.370(4). Defendant makes claims, but offers no
18 other support for his factual contentions in the form of supporting affidavits, court
19 documents or other records. Defendant fails to provide any evidence which supports
20 his claim that his attorney told him that his appeal was still pending after it had
21 already been dismissed. As such, the allegations made by Defendant are merely
22 naked and are insufficient to provide any post-conviction relief. Defendant's
23 contention is a mere bare and naked allegation, which is not supported by any
24 evidence other than his own self-serving and suspiciously untimely affidavit. His
25 petition was properly denied, as it lacked support.

26 **II. THE DEFENDANT'S ACTION WAS PROPERLY DENIED AS**
27 **UNTIMELY FILED PURSUANT TO NRS 34.726.**

28 NRS 34.726 requires petitions challenging the validity of a judgment to be filed
within one year of the remittitur unless the defendant demonstrates good cause for
delay and undue prejudice. NRS 34.726 provides:

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(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.

In this case, Defendant did not file the Petition for Writ of Habeas Corpus until July 14, 2003, almost four years after the filing of the Remittitur on July 19, 1999. Therefore, Defendant's petition is untimely, procedurally barred, and was properly denied by the district court.

III. DEFENDANT HAS NOT DEMONSTRATED GOOD CAUSE FOR DELAY OR UNDUE PREJUDICE.

The district court properly found that the Defendant failed to demonstrate good cause existed to excuse the late filing. In order to survive dismissal for late filing, the Defendant must show good cause for a delay, including showing that it was not Defendant's fault and showing actual prejudice. NRS 34.726. The statute expressly provides that the petitioner has the burden of demonstrating good cause and undue prejudice. NRS 34.726; Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 537 (2001). Although Defendant's petition was not filed within one year of the remittitur, as required by NRS 34.726(1), he argues that good cause existed for the late filing because his attorney allegedly told him that his appeal was still pending after it had actually been dismissed. The Defendant has failed to show good cause for the delay in filing.

The Court has held that the good cause necessary to overcome a procedural bar must be some impediment external to the defense. See Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Mazzan v. Whitley, 112 Nev. 838, 841, 921 P.2d 920, 921-922 (1996);

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1 Passanisi v. Director, Nevada Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989);
2 Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998); see also Murray v.
3 Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986). In Harris, 114 Nev. at 959, 964 P.2d at
4 787, the Court explains that "the existence of cause for a procedural default must
5 ordinarily turn on whether the prisoner can show that some objective factor external to
6 the defense impeded counsel's efforts to comply with the State's procedural rule."
7 Examples of impediments external to the defense include a factual or legal basis that
8 was not reasonably available during the one year filing period or interference by
9 officials that made compliance with the one year filing period impossible. Pellegrini,
10 117 Nev. 860, 34 P.3d at 537.

11 As the Nevada Supreme Court noted in Hathaway v. State, 119 Nev. 30, 7 P.3d
12 503, 506 (2003), "[a] claim or allegation that was reasonably available to petitioner
13 during the statutory time period would not constitute good cause to excuse the delay."

14 A Defendant does not have a federal or state constitutional right to counsel in
15 post-conviction relief proceedings. Coleman v. Thompson, 501 U.S. 722, 725, 111
16 S.Ct. 2546, 2552 (1991); McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-
17 58 (1996). In Coleman, 501 U.S. at 754, 111 S.Ct. at 2567, the United States
18 Supreme Court stated "[a]s between the State and the petitioner, it is the petitioner
19 who must bear the burden of a failure to follow state procedural rules." The Nevada
20 Supreme Court reached a similar conclusion in Crump v. Warden, 113 Nev. 293, 304,
21 934 P.2d 247, 253 (1997), when, citing Coleman, it stated, "mere attorney error, not
22 rising to the level of ineffective assistance of counsel, such as attorney ignorance or
23 inadvertence, is not 'cause' because the attorney is the petitioner's agent when acting,
24 or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk
25 of attorney error.'"

26 In the current case, the Defendant claims he had good cause for delay. In his
27 petition, he states that he did not file a petition in a timely manner because he thought
28 his appeal was still pending after it was dismissed. Defendant fails to show that his

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1 attorney provided ineffective assistance, however. Defendant relies on Hathaway,
2 119 Nev. 30, 7 P.3d at 505, for the proposition that ineffective assistance of counsel
3 might constitute good cause for delay. In Hathaway, the defendant erroneously
4 believed that his counsel had filed a direct appeal because his attorney told him he had
5 filed, but failed to file the appeal.

6 First, the facts of the current case are distinct, and do not rise to the level of
7 ineffective assistance of counsel. In the current case, Defendant's counsel filed a
8 direct appeal; in Hathaway, counsel neglected to file the appeal altogether, but told his
9 client that he had filed the appeal. Hathaway applies to cases in which Defendant is
10 denied the opportunity to file a direct appeal due to ineffective assistance of counsel.
11 Defendant's counsel's conduct in the current case did not rise to the level of failing to
12 file an appeal after assuring a defendant that an appeal was filed. Defendant was not
13 depending on counsel to file his petition. Mere attorney error, not rising to the level
14 of ineffective assistance of counsel, such as attorney ignorance or inadvertence, is not
15 cause because the attorney is the petitioner's agent when acting. Crump v. Warden,
16 113 Nev. at 304, 934 P.2d at 253. Failing to notify of dismissal of an appeal
17 constitutes attorney inadvertence, not ineffective assistance. Defendant was not
18 denied a direct appeal. He was simply misinformed about its termination.
19 Furthermore, in the case at bar there was absolutely no interference by officials.
20 Thus, Defendant has not shown good cause for his delay.

21 Second, the claim was reasonably available to Defendant during the statutory
22 period, and, thus, there is no good cause for delay. In Hathaway, 119 Nev. 30, 7 P.3d
23 at 506, the court explained, "[a] claim or allegation that was reasonably available to
24 petitioner during the statutory time period would not constitute good cause to excuse
25 the delay." For the entire year after the remittitur issued, Defendant could have
26 independently sought information about the status of his case or pursued other post-
27 conviction avenues. In fact, a defendant can file a petition for writ of habeas corpus
28 even while a direct appeal is pending. Statutory time bars only define how long a

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1 defendant has to file a petition, not how soon a petition can be filed. NRS 34.724
2 provides in pertinent part:

3 1. Any person convicted of a crime and under sentence of death or
4 imprisonment who claims that the conviction was obtained, or that the
5 sentence was imposed, in violation of the Constitution of the United
6 States or the constitution or laws of this state, or who claims that the
7 time he has served pursuant to the judgment of conviction has been
improperly computed, may, without paying a filing fee, file a
postconviction petition for a writ of habeas corpus to obtain relief from
the conviction or sentence or to challenge the computation of time that
he has served.

8 2. Such a petition [for a writ of habeas corpus filed after conviction]:
9 (a) Is not a substitute for and does not affect any remedies which are
10 incident to the proceedings in the trial court or the remedy of direct
review of the sentence or conviction.

11 The claims Defendant raised in his petition were reasonably available to him anytime
12 after conviction, even while his appeal was pending. Thus, his claims were available
13 during the statutory time period.

14 Third, even applying the test Defendant cites from Hathaway, assuming
15 ineffective assistance, Defendant still fails to show good cause. Defendant fails to
16 show that he reasonably believed his counsel was pursuing a direct appeal and that he
17 filed his petition within a reasonable time after he should have known that his counsel
18 was not pursuing a direct appeal. The court in Hathaway, *id.* at 507-508 (citations
19 omitted), explains:

20 Trial counsel is ineffective if he or she fails to file a direct appeal after a
21 defendant has requested or expressed a desire for a direct appeal;
22 counsel's performance is deficient and prejudice is presumed under
23 these facts. In Loveland, the Ninth Circuit Court of Appeals recognized
24 that "[i]f a defendant reasonably believes that his counsel is pursuing his
25 direct appeal he most naturally will not file his own post-conviction
26 relief petition." The court in Loveland held that a petitioner's reliance
27 upon his counsel to file a direct appeal is sufficient cause to excuse a
28 procedural default if the petitioner demonstrates: "(1) he actually
believed his counsel was pursuing his direct appeal, (2) his belief was
objectively reasonable, and (3) he filed his state post-conviction relief
petition within a reasonable time after he should have known that his
counsel was not pursuing his direct appeal." We conclude that the test
set forth in Loveland is a reasonable test for evaluating an allegation of
good cause based upon a petitioner's mistaken belief that counsel had
filed a direct appeal.

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1 Even if the Defendant objectively believed his appeal was pending, such a
2 belief was unreasonable, and he did not file within a reasonable time of when he
3 should have known his appeal was dismissed. Notice of Defendant's appeal was filed
4 January 20, 1999. Defendant alleges that he believed it was still pending until May
5 2001, two and a half years later. He apparently did not receive any falsified papers
6 from his attorney regarding his appeal for the two years after the remittitur was issued,
7 or he would have attached them to his petition. At some point during those two and a
8 half years, without receiving anything of substance from his attorney, Defendant
9 should have investigated the matter further. His alleged belief that the appeal was still
10 pending was far from reasonable. Further, Defendant unreasonably delayed in filing
11 over two years after he allegedly learned of the dismissal, finally filing his petition in
12 June 2003. He reasonably should have known even earlier, so his delay was actually
13 even less reasonable. Thus, this claim regarding good cause for delay was actually
14 available to him for over two years, and reasonably available to him for even longer,
15 before he finally filed. Defendant claims he delayed so long after finding out about
16 the dismissal because his counsel had to research, write, and wait for important
17 caselaw to develop. This is not an adequate excuse for delaying two more years. If it
18 were, defendants could delay ad infinitum to wait for favorable precedent to emerge.
19 His delay after finding out about the dismissal was unreasonable.

20 In addition, dismissal of the instant petition will not prejudice the Defendant.
21 The Defendant must demonstrate prejudice to show good cause pursuant to NRS
22 34.726. The Defendant has no legal basis to challenge his conviction. The Court
23 explains that in order to establish prejudice, a defendant must show "not merely that
24 the errors of trial created possibility of prejudice, but that they worked to his actual
25 and substantial disadvantage, in affecting the state proceedings with error of
26 constitutional dimensions." Pellegrini, 117 Nev. 860, 34 P.2d at 537 (citing Hogan v.
27 Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993)). In regard to the requirement
28 of prejudice, the Nevada Supreme Court has further stated:

1 requiring prejudice to excuse the filing of untimely petitions helps to
2 ensure that claims are raised before evidence is lost or memories fade.
3 Without such limitations on the availability of post-conviction remedies,
4 prisoners could petition for relief in perpetuity and thus abuse post-
5 conviction remedies. In addition, meritless, successive and untimely
6 petitions clog the court system and undermine the finality of convictions.
7 A showing of prejudice is thus essential to prevent the filing of
8 successive and meritless petitions for post-conviction relief.

9 Lozada v. State, 110 Nev. at 358, 871 P.2d at 950 (1994).

10 Here the Defendant has alleged no prejudice, and has not shown that any actual
11 prejudice resulted from the errors alleged in his petition. Defendant has failed to
12 show good cause or prejudice and, therefore, his petition should be denied as barred
13 by the one year time limit in NRS 34.726.

14 **IV. DISTRICT COURTS MUST ENFORCE PROCEDURAL BARS.**

15 Legislatively mandated procedural bars are not simply a legal technicality.
16 They serve a vital role in maintaining the viability of the criminal justice system.

17 “[R]easonable adherence to clear, reasonable and known rules of
18 procedure is essential to the administration of justice. Justice cannot be
19 administered in chaos. Moreover the administration of justice involves
20 not only meticulous disposition of the conflicts in one particular case but
21 the expeditious disposition of hundreds of cases. If the courts must stop
22 to inquire where substantial justice on the merits lies every time a litigant
23 refuses or fails to abide the reasonable and known rules of procedure,
24 there will be no administration of justice. Litigants must be required to
25 cooperate in the efficient disposition of their cases.”

26 United States v. Seigel, 168 F.2d 143 (D.C., 1948).

27 As the Nevada Supreme Court noted in Pellegrini, 117 Nev. 860, 34 P.3d at
28 530, “the legislative history of the habeas statutes shows that Nevada’s lawmakers
never intended for petitioners to have multiple opportunities to obtain post-conviction
relief absent extraordinary circumstances.” Furthermore, legislative imposition of
statutory time limits “evinces intolerance toward perpetual filing of petitions for relief,
which clogs the court system and undermines the finality of convictions.” Id. at 529.
Defendants are entitled to “one time through the system absent extraordinary
circumstances.” Id. at 530.

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1 “Where the intention of the Legislature is clear, it is the duty of the court to
2 give effect to such intention and to construe the language of the statute so as to give it
3 force and not nullify its manifest purpose.” Woofter v. O’Donnell, 91 Nev. 756, 762,
4 542, P.2d 1396, 1400 (1975); Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637
5 (1983).

6 Nevada courts, and the Nevada Supreme Court in particular, have been under
7 regular attack by petitioners who claim Nevada does not consistently apply its
8 procedural bars. See, e.g., Loveland, 231 F.3d 640 (denying claim made that Nevada
9 does not consistently apply NRS 34.726(1), the one year limit for filing habeas
10 petition). These attacks have continued even though both the Nevada Supreme Court
11 and the Ninth Circuit have recently ruled that “a petitioner must establish ‘good
12 cause’ and ‘actual prejudice’ to overcome a post conviction procedural bar.” Valerio
13 v. State, 112 Nev. 383, 390, 915 P.2d 874 (1998); Loveland, 231 F.3d 640. As long
14 as the State rules are consistently applied, the federal courts must show deference to
15 the State court’s application of procedural bars. Loveland, 231 F.3d 640. In
16 Petrocelli v. Angelone, 248 F.3d 877 (9th Cir.2001), the Ninth Circuit Court of
17 Appeals, citing its earlier decision in Moran v. McDaniel, 80 F.3d 1261 (9th
18 Cir.1996), found that the Nevada Supreme Court had consistently applied the
19 procedural bar in NRS 34.800.

20 The United States Supreme Court has also addressed the importance of
21 procedural bars. In Bousley v. United States, 523 U.S. 614, 629, 118 S.Ct. 1604,
22 1614 (1998), the Court stated “[n]o criminal law system can function without rules of
23 procedure conjoined with a rule of finality.”

24 In Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986), the United States
25 Supreme Court stated that “[a] State’s procedural rules serve vital purposes on appeal
26 as well as at trial and on state collateral attack, and the standard for cause should not
27 vary depending on the timing of a procedural default.” The Court went on to say
28 “[a]ttorney error short of ineffective assistance of counsel does not constitute cause

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1 for a procedural default even when that default occurs on appeal rather than at trial.”
2 Id. To the contrary, cause for a procedural default on appeal ordinarily requires a
3 showing of some external impediment preventing counsel from constructing or raising
4 the claim. Murray, 477 U.S. at 492, 106 S.Ct. at 2648.

5 Finally, in United States v. Timmreck, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087
6 (1979), the United States Supreme Court stated that “[e]very inroad on the concept of
7 finality undermines confidence in the integrity of our procedures; and, by increasing
8 the volume of judicial work, inevitably delays and impairs the orderly administration
9 of justice.”

10 The denial of Defendant’s petition properly supports the consistent application
11 of procedural time bars as well as the concerns of both the Nevada Supreme Court and
12 the United States Supreme Court with the finality of convictions.

13 **9. Preservation of the Issue.**

14 The State of Nevada agrees that the issues were properly preserved for appeal
15 except as specifically noted above.

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VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to raise material issues or arguments in the fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 2nd day of January, 2004.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney

BY


JAMES TUFTLAND
Chief Deputy District Attorney
Nevada Bar #000439
200 South Third Street
4th Floor
Las Vegas, Nevada 89155-2212
(702) 455-4711

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Fast Track Response to the attorney of record listed below on this 2nd day of January, 2004.

Anthony P. Sgro
Patti & Sgro
300 East Charleston Blvd.
Suite 105
Las Vegas, Nevada 89104



Employee, Clark County
District Attorney's Office

TUFTj/Nell Keenan/mulkn

APP. 202

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN D. WALKER,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 42292

FILED

MAR 05 2004

ORDER OF AFFIRMANCEJANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Appellant was originally convicted, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon. This court affirmed appellant's conviction.¹ The remittitur issued on July 19, 1999.

On August 13, 2001, the district court appointed post-conviction counsel for appellant. Nearly two years later, on July 14, 2003, counsel filed a post-conviction petition for a writ of habeas corpus. In the petition, counsel argued that there was good cause for the delay because appellant had not been informed by previous counsel that his direct appeal had been dismissed.

The State filed a motion to dismiss the petition, arguing that it was procedurally barred. Counsel for appellant filed an opposition, and after allowing the parties to argue the motion to dismiss, the district court

¹Walker v. State, Docket No. 33637 (Order Dismissing Appeal, June 21, 1999).

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dismissed the petition, finding that it was procedurally barred, and that appellant had failed to demonstrate good cause.²

Initially, we note that generally this court will not disturb a district court's finding regarding good cause, "except for clear cases of abuse."³

Appellant's petition was filed nearly four years after this court issued the remittitur in his direct appeal. Appellant argues that he did not become aware that his direct appeal had been dismissed until May, 2001, after the death of his previous attorney, John Fadgen. Appellant further argues that Fadgen told him that his direct appeal was still pending "sometime during the year 2000," when in fact it had already been dismissed.

Appellant argues that he is entitled to relief based on this court's decision in Hathaway v. State.⁴ Specifically, appellant points to this court's holding that "a petitioner can establish good cause for the delay under NRS 34.726(1) if the petitioner establishes that the petitioner reasonably believed that counsel had filed an appeal and that the petitioner filed a habeas corpus petition within a reasonable time after learning that a direct appeal had not been filed."⁵

In the instant case, appellant concedes that he learned that his appeal had been dismissed in May, 2001. The petition was not filed for

²See NRS 34.726(1).

³Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

⁴119 Nev. ___, 71 P.3d 503 (2003).

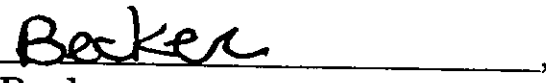
⁵Id. at ___, 71 P.3d at 508.

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another two years. The district court found that appellant did not file his petition within a reasonable time after learning that his direct appeal had been dismissed. We conclude that appellant has not demonstrated that the district court clearly abused its discretion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 C.J.
Shearing

 J.
Becker

 J.
Gibbons

cc: Hon. John S. McGroarty, District Judge
Patti & Sgro
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

APP. 205

AFFIDAVIT OF JAMES A. COLIN, ESQ.**RE: State v. Walker, Eighth Judicial District Court Case#: C146419**

STATE OF NEVADA)

ss

COUNTY OF CLARK)

JAMES A. COLIN, ESQ., having first been duly sworn, deposes, and states:

1. That your affiant is an attorney duly licensed to practice in Nevada, Bar #6257.

2. That your affiant is employed as an attorney by Patti & Sgro, and works for Anthony P. Sgro, the attorney appointed on August 13, 2001 to represent Christian Walker in the post-conviction proceedings for Case #C146419.

3. That your affiant performed work on the post conviction Writ of Habeas Corpus and Points and Authorities in support thereof for the case referred to in Paragraph 2, and in that capacity, became aware that multiple grounds existed for appellate relief in the case, including the ineffective assistance of trial counsel and appellate counsel, and the legality/propriety of the aiding and abetting jury instructions given during trial.

4. That Christian Walker was very concerned about the filing of his Writ of Habeas Corpus within a reasonable time, and, toward that end, drafted and prepared his own Pro Per Writ of Habeas Corpus, and sent it to me to file before August 2002.

5. That it was and is my legal position and belief that, pursuant to NRS 34.726, once a full year has passed from remittitur, no firm deadline of any sort exists for filing under the "good cause" provision of the statute, except that a presumption of prejudice to the State will arise after five (5) years pursuant to NRS 34.800.

6. That it was and is my legal position and belief that Hathaway v. State, 71 P.3d 503 (Nevada 2003) mandates that under the circumstances of this case an evidentiary hearing must be granted by the District Court to allow Christian Walker an opportunity to establish that "good cause" existed for his filing of his post-conviction Petition after the one year time limit had passed.

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1 7. That in the course of my representation of Christian Walker, I explained to him my legal
2 position and beliefs as referred to in paragraphs 5 and 6 of this affidavit, and informed him that because
3 important and relevant Nevada and 9th Circuit caselaw was still being developed, an additional delay
4 in filing was beneficial and could reveal new appellate arguments and support, and the only absolute
5 deadline was the five (5) year presumption of prejudice date.
6

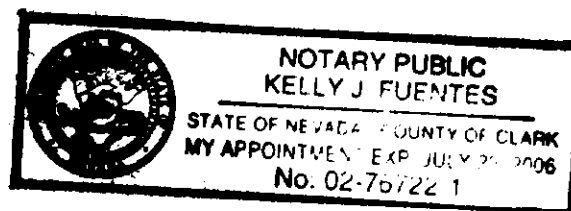
7 8. That the Writ of Habeas Corpus and Points and Authorities in support were ultimately
8 filed by counsel well before any presumption of prejudice to the State would arise under the law, but
9 almost two (2) years after appointment of counsel, and the reason that there was this long delay in
10 filing by counsel is because counsel was waiting for important Nevada and 9th Circuit caselaw to
11 develop, and (for the reasons described in paragraphs 5 and 6 of this affidavit) did not believe
12 Petitioner Walker would be negatively prejudiced thereby.
13

14
15 FURTHER YOUR AFFIANT SAYETH NAUGHT

16
17 
18 JAMES A. COLIN, ESQ.
19

20 SUBSCRIBED and SWORN before me
21 this 14th day of May, 2004.

22 
23 NOTARY PUBLIC in and for said
24 COUNTY and STATE
25
26
27
28



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PATTI & SGRO, P.C.

ATTORNEYS AT LAW

Dean R. Patti
Anthony P. Sgro

Jon W. Norheim*
James A. Colin**
Stephen K. Lewis***
Dewayne Nobles
*Also Licensed in California
**Also Licensed in Washington
***Also Licensed in Arizona

Christian Walker
#60225
ELY State Prison
P.O. Box 1989
Ely, NV 89301

September 25, 2003

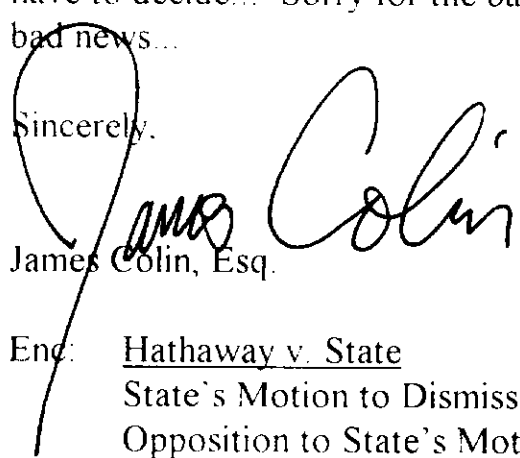
Dear Christian:

I attended the Writ argument on Tuesday, September 23, 2003 and to my honest surprise, McGroarty denied the Petition *without* an evidentiary hearing. The case Hathaway v State, copy enclosed, supports our position, and I believe provides very legitimate appellate grounds. I will file a Notice of Appeal on your behalf, and we can then talk about the next step...

After he ruled against us, I queried the Judge for his reasoning and how he could distinguish Hathaway, but he simply said the State had distinguished Hathaway in their brief. From reading the brief, all I can guess is that maybe he bought their argument that your claim was "reasonably available" *during* the initial one-year statutory time period. Thus, he seems to have held you had a duty to independently check on the status of the appeal and learn that it was dismissed.

I still think we were entitled, at least, to an evidentiary hearing. The Nevada Supreme Court will have to decide... Sorry for the bad news, and I did also call your mom and left a message with the bad news...

Sincerely,


James Colin, Esq.

Enc: Hathaway v. State
State's Motion to Dismiss
Opposition to State's Motion to Dismiss

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PATTI & SGRO, P.C.

ATTORNEYS AT LAW

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**Also Licensed in Washington
***Also Licensed in Arizona

Christian Walker
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Ely, NV 89301

September 25, 2003

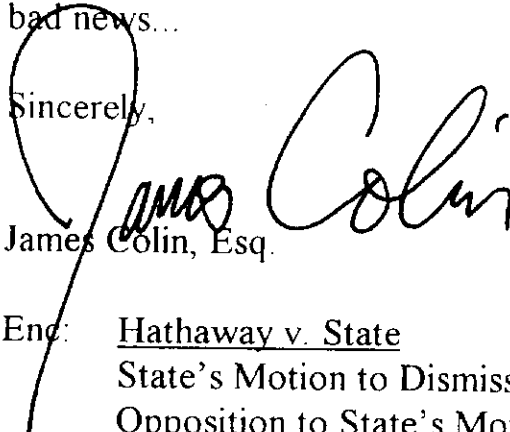
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After he ruled against us, I queried the Judge for his reasoning and how he could distinguish Hathaway, but he simply said the State had distinguished Hathaway in their brief. From reading the brief, all I can guess is that maybe he bought their argument that your claim was "reasonably available" *during* the initial one-year statutory time period. Thus, he seems to have held you had a duty to independently check on the status of the appeal and learn that it was dismissed.

I still think we were entitled, at least, to an evidentiary hearing. The Nevada Supreme Court will have to decide... Sorry for the bad news, and I did also call your mom and left a message with the bad news...

Sincerely,


James Colin, Esq.

Enc: Hathaway v. State
State's Motion to Dismiss
Opposition to State's Motion to Dismiss

APP. 209

FILED

NOV 21 2000

T. Slaughter
STATE BAR OF NEVADA

Case No. 99-101-0020

STATE BAR OF NEVADA

SOUTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA,

Complainant,

vs.

JOHN FADGEN, ESQ.

Respondent

PUBLIC REPRIMAND

This matter was heard by a Formal Hearing Panel on November 14, 2000. By and through his counsel William B. Terry, Esq, Respondent John Fadgen and Bar Counsel agreed to the imposition of the following public reprimand pursuant to a Conditional Guilty Plea tendered in accordance with SCR 113(1).

To: JOHN FADGEN

You were retained to represent Dr. John Adan in a lawsuit previously filed against his former employee Mary Russo and to defend a Counterclaim brought by Mary Russo.

On or about April 15, 1998, you confirmed your representation to opposing counsel, Mace Yampolski. You were aware of an urgent need to provide discovery and you requested a brief extension of time until April 20, 1998, to provide discovery. However, you did not provide discovery by April 20, 1998, and opposing counsel filed a Motion to Compel Discovery or in the alternative, Motion to Strike the Complaint and Reply to Counterclaim. You failed to respond to that Motion and at a May 13, 1998, hearing, Discovery Commissioner Biggar recommended striking the Complaint and Reply to Counterclaim.

On May 26, 1998, your client, on his own, filed an objection to the Discovery Commissioner's report and recommendation and on June 4, 1998, the court confirmed the Discovery Commissioner's recommendation.

On June 29, 1998, opposing counsel filed and served a three-day Notice to Take Default and on July 10, 1998, a Motion to Prove Up of Default. You did not respond.

APP. 210

1 On September 4, 1998, the court, on its own initiative, reinstated the Complaint and
2 Reply to Counterclaim. A different judge then reinstated the earlier decision and allowed a
3 prove-up of default hearing to occur on October 26, 1998. You did not attend that hearing. A
4 five million dollar judgment was entered against your client as a result.

5 On January 4, 1999, the court heard your Motion to Set Aside Default Judgment. During
6 that hearing, you stated in open court upon the record that "...and I don't want to place the blame
7 on anyone but myself. I've had staffing problems. I did have a problem with a workload, and
8 I'll take the blame rather than shift the blame anywhere else."

9 The court did not grant your Motion. At some point after losing the motion, Dr. Adan
10 terminated your representation. You then refunded Dr. Adan's \$7,500 retainer.

11 Dr. Adan's bank accounts were garnished and he ultimately declared bankruptcy. The
12 lawsuit was exempted from the bankruptcy protection and was ultimately settled in a confidential
13 settlement agreement.

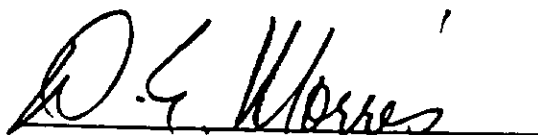
14 Your prior disciplinary history was considered in aggravation when determining the
15 imposition of discipline in this matter.

16 Your conduct violated SCR 151 (competence), SCR 153(diligence) and SCR 154
17 (communication) and you are hereby PUBLICLY REPRIMANDED.

18 The State Bar shall publish this reprimand in accordance with SCR 113(5).

19 ORDERED this 17th Day of November, 2000.

20 FORMAL HEARING PANEL

21 
22 DANA MORRIS, ESQ., CHAIR

23 Southern Nevada Disciplinary Board Panel
24
25

APP. 211

ATTORNEY: John P. Fadgen

FILE NO.: 80-141

DISCIPLINE IMPOSED: Public Reprimand

FINE: \$1,726.07

CODE VIOLATION: DR 6-101(A)(3), DR 7-101(A)(1), (2), (3)
DR 2-110(A)(3), DR 1-102(A)(1), (4), (5)
(6). SCR 198,

CONDITION OF REINSTATEMENT:

APP. 212

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN P. FADGEN,

Appellant,

vs.

STATE BAR OF NEVADA,

Respondent.

No. 14753

FILED

APR 25 1985

CLERK OF SUPREME COURT
BY *Deanne C. O'Neil*
DEPUTY CLERKORDER OF REPRIMAND

The Southern Nevada Disciplinary Board has recommended that this court impose public discipline on John P. Fadgen. Having received no opposition to the Board's recommendation, and good cause appearing, the recommendation is granted.

Furthermore, the full costs of the disciplinary proceedings shall be assessed against Fadgen in accordance with SCR 120(1).

It is so ORDERED.

Springer, C. J.
Springer

Mowbray, J.
Mowbray

Runderson, J.
Runderson

Steffen, J.
Steffen

Young, J.
Young

cc: Robert M. Apple, Acting Chairman,
Southern Nevada Disciplinary Board
Ann Bersi, State Bar Executive Director
Michael E. Barr, Bar Counsel
Kirby R. Wells
John P. Fadgen

APP. 213

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN P. FADGEN,

Appellant,

vs.

STATE BAR OF NEVADA,

Respondent.

No. 14753

FILED

APR 25 1985

CLERK OF SUPREME COURT
BY *Deanne C. Richard*
DEPUTY CLERKORDER

Pursuant to our order of reprimand in this disciplinary proceeding, we hereby authorize the publication, in accordance with SCR 121, of the following letter of reprimand, submitted by the State Bar of Nevada Disciplinary Board, Southern District, Robert M. Apple, Acting Chairman:

Dear Mr. Fadgen:

Between July, 1980 and November, 1982, you were retained on five separate matters, all of which resulted in the filing of grievances by the clients who had retained you in these matters. In the first matter you were retained to defend an eviction action. Thereafter, you failed to respond to inquiries and phone calls by your client and failed to keep her advised of the status of her matter. You further failed to respond to the State Bar's request that you respond to your client's letter of grievance. You agreed to refund \$350.00 to your client after an informal hearing panel meeting. After failing to do so, you also failed to respond to a letter from State Bar counsel seeking a status report.

In the second matter you were retained by a client to represent him on an appeal from a judgment in a civil case. The appeal was dismissed and the appeal bond forfeited when you failed to timely obtain a transcript and perfect the record on appeal. You failed to respond to two letters from the State Bar requesting a response to your client's grievance.

In the third matter you were retained to appear at an administrative proceeding and received a retainer. When your client appeared at your office he was told he would be represented by your former associate. Thereafter, you failed to respond to your client's inquiries and failed to keep him advised of the status of his case. When your client filed a grievance, you failed twice to respond to the State Bar's written request for a reply to the grievance letter.

APP. 214

In the fourth matter, an out of state attorney referred a client to you in connection with a personal injury case. The attorney later provided you with additional information. You failed to respond to the attorney's request for a status report on three occasions. You did not reply to his requests, notwithstanding notice that he would have no alternative but to file a complaint with the State Bar.

In the fifth matter you were retained by a client in connection with an appeal from a criminal conviction. You received a retainer, filed a notice of appeal and obtained an order granting you additional time to transmit the appeal. You took no further action on behalf of your client. The District Attorney's office moved successfully for a dismissal of the appeal because it had been abandoned. You failed to respond to your client's repeated requests for status reports. You failed to respond to the several requests made by your client's new counsel for a status report.

After acceptance of employment you did not diligently conduct your clients' causes to an expeditious conclusion, and therefore violated Supreme Court Rule 173. You did not perform your duty to take all proper actions and steps to preserve and protect the legal merits of your clients' positions and claims, in violation of Supreme Court Rule 172. In several of the matters you did not competently represent your client and neglected a legal matter entrusted you, in violation of ABA Code of Professional Responsibility DR 6-101(A)(3). You failed to seek the objectives of your clients through reasonably available means permitted by law and therefore prejudiced the rights of your clients in violation of DR 7-101(A)(1). You failed to carry out a contract of employment entered into with your clients for professional services in violation of DR 7-101(A)(2). You abandoned your client, were subsequently discharged from the case and thereafter failed to refund promptly any part of the fee paid in advance that had not been earned, in violation of DR 2-110(A)(3). Your failure to refund monies or account to your client for monies received after repeated demands by your client adversely reflects on your fitness to practice law in violation of DR 2-110(A)(3) and DR 1-102(A)(6).

Your failure to respond to inquiries by the State Bar and provide a response to the grievance violates DR 1-102(A)(1), (A)(5), and (A)(6). Your failure to refund the monies or return the file after your representation that you would do so is evidence of deceit and misrepresentation in violation of DR 1-102(A)(4) and Supreme Court Rule 198. You prejudiced and damaged your client during the course of the professional relationship, in violation of DR 7-101(A)(3).

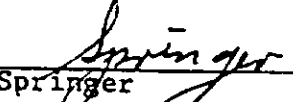
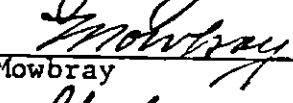
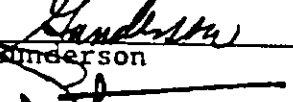
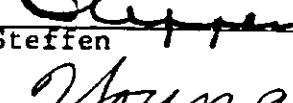
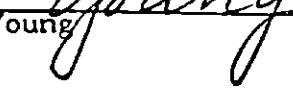
APP. 215

Normally, in cases involving repeated acts of serious neglect, a suspension would be warranted. That policy is now being emphasized in recent disciplinary actions in order to ensure that the Bar is on notice of the probable sanctions for particular kinds of conduct. The disciplinary board members have themselves noticed a greater attention by both themselves and other members of the Bar to certain housekeeping responsibilities which are designed to avoid neglect.

Initially, three grievances were filed against you which resulted in a complaint before the Southern Disciplinary Board, resulting in a recommendation permitting you to avoid suspension by payment of restitution. The additional cases compounded your situation. However, the Board believes that the fact that you met your restitutional obligations mitigates the severity of sanctions to be imposed. Accordingly, it is the unanimous decision of the Disciplinary Board to issue this letter of public reprimand.

STATE BAR OF NEVADA
By: Robert M. Apple
Acting Chairman,
Southern Nevada Disciplinary
Board

It is so ORDERED.

 , C. J.
Springer
 , J.
Mowbray
 , J.
Henderson
 , J.
Steffen
 , J.
Young

cc: Robert M. Apple, Acting Chairman,
Southern Nevada Disciplinary Board
Ann Bersi, State Bar Executive Director
Michael E. Barr, Bar Counsel
Kirby R. Wells
John P. Faden

APP. 216

1 CASE NO. 80-141; 84-31
2
3
4

5 STATE BAR OF NEVADA

6 SOUTHERN NEVADA DISCIPLINARY BOARD

7 STATE BAR OF NEVADA,)
8 Complainant,)
9 vs.)

10 JOHN P. FADGEN,)
11 Respondent.)
12

FINDINGS AND RECOMMENDATION

13 I.

14 PRELIMINARY STATEMENT

15 On April 7, 1983, the Southern Nevada Disciplinary
16 Board forwarded its Findings of Fact, Conclusions of Law and
17 Recommendation to the Supreme Court on this same matter. A copy
18 of said findings and recommendation is attached hereto as
19 Exhibit "A" and made a part hereof. By stipulation of then
20 Bar Counsel Kathy Teague and Kirby Wells, attorney for the
21 Respondent, the matter was remanded to the Disciplinary Board for
22 the taking of psychiatric testimony. A copy of this Court's
23 Order of remand is attached hereto as Exhibit "B" and made a
24 part hereof.

25 Prior to the scheduling of a hearing for the purpose of
26 taking psychiatric testimony, two significant events occurred.
27 One was the payment of restitution to the clients named in the
28 original findings and recommendation. That payment was given
29 to the State Bar by the Respondent on June 6, 1983. At that time, the
30 sole cost item which was not advanced was reimbursement to the
31 State Bar in the amount of \$1,726.07. The second item of note
32 which occurred was the receipt by the State Bar office of two

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1 additional complaints against Respondent for essentially the
2 same kind of neglectful conduct which precipitated the initial
3 complaint and the original findings and recommendation.

4 The two additional counts were added to a petition
5 against the Respondent for hearing contemporaneously with the
6 taking of psychiatric evidence. The hearing was scheduled
7 for June 21, 1984. Immediately prior to the time of hearing,
8 the undersigned, State Bar Counsel and attorney for the Respon-
9 dent, all agreed to the following findings and recommendation as
10 the most equitable resolution of this matter.

II.

FINDINGS

13 The Southern Nevada Disciplinary Board hereby reasserts
14 the Findings of Fact enumerated in Exhibit "A." In addition, the
15 Board further finds that the Respondent substantially neglected
16 his obligations with respect to the following two cases.

17 CASE NO. 1
18 1. During the month of February 1981, Richard G.
19 Smith, an attorney practicing law in Jaffrey, New Hampshire,
20 referred a client to the Respondent. The client was Donna
21 Coughlan, also of New Hampshire. She had been injured during
22 a fire while staying at the MGM Grand Hotel in Las Vegas, Nevada.

23 2. By letter dated February 17, 1981, Mr. Smith
24 provided additional information to Respondent with respect to a
25 potential claim of false imprisonment against the MGM Grand
26 Hotel by Ms. Coughlan.

27 3. On April 30, 1981, Mr. Smith asked the Respondent
28 for a status report. The Respondent did not reply. On December
29 7, 1981, Mr. Smith again asked the Respondent for a status report
30 indicating the distress of Ms. Coughlan at not having received any
31 information. Respondent did not reply to this letter.

32 4. On May 27, 1983, Mr. Smith again wrote the Respon-
dent for a status report. Mr. Smith indicated that he would have

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1 no alternative but to file a complaint with the Nevada Bar
2 Association in the event that he did not hear from the Respondent.
3 The Respondent did not reply to this letter.

4 5. By the foregoing conduct, Respondent neglected a
5 legal matter entrusted to him.

6 CASE NO. 2
7 6. During the month of November 1982 the Respondent
8 was retained by Val Davis Day of Carson City, Nevada. The
9 Respondent was to pursue an appeal of a criminal conviction.
10 Respondent received an initial payment from Mr. Day of \$1,500
11 toward a total fee of \$5,000. Mr. Day was to pay the Respondent
12 \$250 per month.

13 7. On or about November 18, 1982, the Respondent filed
14 a Notice of Appeal on behalf of Mr. Day and on December 28, 1982,
15 Respondent obtained an order signed by Judge James Brennan
16 granting defendant until February 16, 1983, to transmit the
17 appeal. Respondent took no further action on behalf of Mr. Day.

18 8. On May 20, 1983, the Clark County District Attorney
19 moved for the dismissal of Mr. Day's appeal on the grounds that
20 said appeal had been abandoned. On June 9, 1983, the Supreme
21 Court of the State of Nevada issued an order dismissing Mr. Day's
22 appeal on the grounds that said appeal had been abandoned. From
23 November 11, 1982, through November 14, 1983, Mr. Day paid the
24 Respondent a total of \$4,500. Mr. Day repeatedly requested
25 status reports from the Respondent but did not receive any.

26 9. Not having received any response from the Respondent,
27 Mr. Day obtained the services of David Phillips, Esq. Mr.
28 Phillips wrote the Respondent several times for a status report
29 on Mr. Day's case. The Respondent did not reply to Mr. Phillips.

30 10. By the foregoing conduct, Respondent neglected a
31 legal matter entrusted to him and failed to carry out a contract
32 of employment thereby prejudicing and damaging his client during
the course of the professional relationship.

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III.

RECOMMENDATION

The Disciplinary Board, in fashioning this recommendation, was cognizant that had Respondent, on June 6, 1983, paid to the State Bar its costs in the original action, that he would have essentially fulfilled his obligations under the recommendation then offered, and the matter would have become moot.¹ By receipt of the additional complaints against Respondent, and by the acknowledgement of the Respondent that there may well have been a psychological impediment which caused a period of neglect from 1981 through 1983, Bar Counsel believed that the matter should be reevaluated by the Disciplinary Board for a further recommendation.

Normally, in cases involving repeated acts of serious neglect, a suspension would be warranted. That policy is now being emphasized in recent disciplinary actions in order to insure that the bar is on notice of the probable sanctions for particular kinds of conduct. The Disciplinary Board members have themselves noticed a greater attention by both themselves and other members of the bar to certain housekeeping responsibilities which are designed to avoid neglect.

In the instant case, all of the acts complained of occurred prior to 1984 and under a prior recommendation permitting the Respondent to avoid a suspension by the payment of restitution.

The additional acts of neglect have compounded Respondent's situation, but the Board believes that the attempt by the Respondent to meet his restitution obligations should be given recognition. Therefore, we recommend that the Respondent,

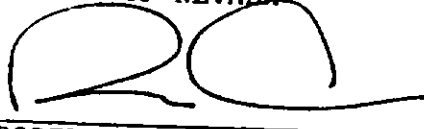
¹The original recommendation was that the Respondent be suspended for a period of four months or pay restitution to certain clients and the State Bar, whichever came first.

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1 upon payment of restitution to Val Day in the amount of \$4,500
2 and upon payment to the State Bar in the amount of \$1,726.07,
3 be publicly reprimanded. Should the Respondent not carry forward
4 his obligations of restitution within the next thirty days, the
5 panel would reconvene for consideration of a recommendation for
6 a greater sanction.

7 DATED this 18th day of July, 1984.

8 STATE BAR OF NEVADA

9
10 By: 

11 ROBERT M. APPLE
12 Chairman, Formal Hearing Panel,
13 Southern Nevada Disciplinary Board
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ORIGINAL

BRIAN SANDOVAL
Attorney General
By: THOM GOVER
Senior Deputy Attorney General
Criminal Justice Division
Nevada Bar Number 5648
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
(702) 486-3120
(702) 486-3768 - fax

Attorneys for Respondents

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHRISTIAN D. WALKER,
Petitioner,

v.

JACKIE CRAWFORD, et al.,
Respondents.

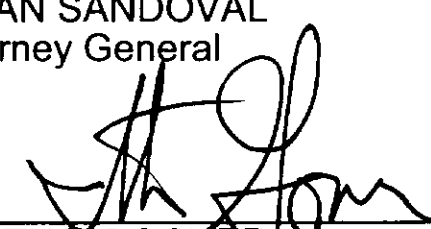
CV S 04-0929-KJD (LRL)

MOTION TO DISMISS

RESPONDENTS, through legal counsel, BRIAN SANDOVAL, Nevada Attorney General, by Deputy Attorney General Thom Gover, move this Court for an order dismissing the Amended Petition For A Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody, (CR #8), filed by CHRISTIAN DORAN WALKER. This Motion is made and based upon all the pleadings and papers on file herein and the following Points and Authorities.

DATED this 9th day of November 2004.

BRIAN SANDOVAL
Attorney General

By: 
THOM GOVER
Senior Deputy Attorney General

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 WALKER'S instant Amended Petition was untimely filed on September 8, 2004. A one
3 year period of limitation applies to an application for a writ of habeas corpus by a person in
4 custody pursuant to the judgment of a state court. 28 U.S.C. § 2244(d)(1). Relevant to the
5 instant matter, the limitation period runs from "the date on which the judgment became final
6 by the conclusion of direct review or the expiration of the time for seeking such review." 28
7 U.S.C. § 2244(d)(1)(A). Additionally, "[t]he time during which a properly filed application for
8 State post-conviction or other collateral review with respect to the pertinent judgment or claim
9 is pending shall not be counted toward any period of limitation under this subsection." 28
10 U.S.C. § 2244(d)(2). If a petition reveals on its fact that the statute of limitations has run, the
11 petitioner has the burden of alleging facts which would give rise to any tolling of the statute.
12 Hinton v. Pacific Enterprises, 5 F.3d 391, 395 (9th Cir. 1993).

13 On the first page of WALKER'S Amended Petition, he alleges that the relevant
14 judgment of conviction was entered against him on January 5, 1999. Amended Petition, (CR
15 #8), Para. 2. WALKER further alleges that he did appeal his conviction, said appeal having
16 been decided on June 21, 1999. Id., Para. 3. WALKER then alleges to have filed a state
17 court petition for post-conviction relief on July 14, 2003; over four years after the resolution of
18 his direct appeal. Id., Para. 4. Review of the remainder of WALKER'S Amended Petition and
19 appendices reveals that all four grounds asserted in the petition are alleged to have been
20 raised in the July 14, 2003 state court petition; his first state court petition for post-conviction
21 relief.

22 Given WALKER'S concessions relating to the delay in filing his state court post-
23 conviction petition, he has the burden to allege facts which would give rise to any tolling of the
24 AEDPA Statute of Limitations. WALKER has failed to allege any entitlement to statutory
25 and/or equitable tolling and he has not alleged any good cause for delay. Review of the state
26 court documents included as appendices to the instant petition reveal that WALKER
27 attempted to justify his violation of state time bars by asserting (1) his counsel on direct
28 appeal failed and/or misinformed WALKER of when his direct appeal was finally decided and

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(2) his later appointed post-conviction counsel waited for the "development" of "...important and relevant Nevada and 9th Circuit case law...". See Amended Petition, (CR #8), Appendix "H" (Affidavit of Counsel attesting to appointment in state court proceedings on August 13, 2001 as post-conviction counsel and conscious decision to delay the filing of any state post-conviction petition.)

Neither assertion would act to toll the running of the statute of limitations in the instant federal habeas action. Under AEDPA there is simply no provision for statutory tolling based upon the lack of receipt of actual notice of the resolution of a state court appeal. Statutory tolling is only available when a properly filed application for state post-conviction or other collateral review pertinent to the judgment is "pending." See 28 U.S.C. §2244(d)(2).

Only a handful of circuit courts have specifically held that equitable tolling may be available when an inmate is not notified of the final resolution of his state court appeals if he has acted diligently in the matter. Knight v. Schofield, 292 F.3d 709, 711 (11th Cir. 2002); Woodward v. Williams, 263 F.3d 1135, 1143 (10th Cir. 2001); Phillips v. Donnelly, 216 F.3d 508, 511 (5th Cir. 2000) see also Lewis v. Mitchell, 173 F. Supp. 2d 1057, 1062 (C.D.Cal 2001). As the Eleventh Circuit quickly notes: "...not in every case will a prisoner be entitled to equitable tolling until he receives notice. Each case turns on its own facts." Knight at 711. This sentiment is certainly in line with general principles of equitable tolling which is only available "...if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999); Jorss v. Gomez, 266 F.3d 955, 957-58 (9th Cir. 2001). Likewise, Courts should "take seriously Congress's desire to accelerate the federal habeas process" and "only authorize extensions when this high hurdle is surmounted." Calderon v. United States Dist. Ct., 128 F.3d 1283, 1288 (9th Cir. 1997).

Factors in defining "due diligence" have been explored in the Eleventh Circuit. In Knight, the fact that the inmate made more than one inquiry to the state supreme court regarding the status of his appeal and that "the ... clerk had assured him that he would be notified as soon as a decision was made.." was viewed as the exercise of due diligence. Id.

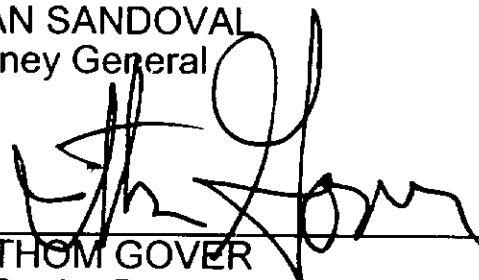
APP. 224

at 711. In distinguishing another case from Knight, the Eleventh Circuit found that one letter mailed a full sixteen months after the appeal was filed was not due diligence. Drew v. Dep't of Corrections, 2002 U.S. App. LEXIS 14494 (July 18, 2002). Also, Lewis v. Mitchell depicts a situation of extraordinary circumstances coupled with due diligence where the California Supreme Court mailed a copy of a denial to the inmate but the prison returned the mail for the lack of a prisoner identification number and the inmate did not receive a copy of the denial until he inquired of the supreme court on his own initiative. Id. at 1062.

Turning to the facts in the instant matter, WALKER has failed to allege any due diligence. Waiting two years after being appointed post-conviction counsel further shows a lack of any due diligence to bring a timely federal habeas petition. WALKER and his counsel consciously made the decision to delay the filing of a state post-conviction petition in order to benefit from some pending case law in the Nevada Courts and the 9th Circuit. See Amended Petition, (CR #8), Appendix "H" (Affidavit and Correspondence of Counsel James A. Colin, Esq.). Their attempt to put their case in a more advantageous position in the Nevada State Courts was certainly done at the expense of any future federal habeas appeal. The pending case law did not work out as anticipated by WALKER and his post-conviction counsel and as a result WALKER is now without a federal remedy. His instant federal petition is untimely filed and must be dismissed with prejudice pursuant to 28 U.S.C. § 2244(d).

DATED this 9th day of November, 2004.

BRIAN SANDOVAL
Attorney General

By: 

THOM GOVER
Senior Deputy Attorney General

APP. 225

CERTIFICATE OF SERVICE

I do hereby certify that I am an employee of the Office of the Attorney General and that on the 9th day of November, 2004 I served a true and accurate copy of the foregoing **Motion To Dismiss** by mailing via United States mail, first class, postage prepaid, to:

CHRISTIAN D. WALKER, #60225
HIGH DESERT STATE PRISON
P.O. Box 650
INDIAN SPRINGS, NV 89070

Danielle Potnar
An Employee of the Office of the Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

APP. 226

1 RENE L. VALLADARES
Federal Public Defender
2 Nevada State Bar No. 11479
MEGAN C. HOFFMAN
3 Assistant Federal Public Defender
Nevada State Bar No. 09835
4 JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
5 New York State Bar No. 2857100
411 E. Bonneville Avenue, Suite 250
6 Las Vegas, Nevada 89101
(702) 388-6577
7 (702) 388-6261 (FAX)

8 Attorneys for Petitioner

9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 CHRISTIAN WALKER,

12 Petitioner,

13 vs.

14 E.K. MCDANIEL, Warden,

15 Respondents.

2:04-cv-00929-KJD-PAL

**PETITIONER'S POST-HEARING
OPENING BRIEF**

16
17 The Petitioner, Christian Walker, through his attorneys, Megan C. Hoffman and Jonathan M.
18 Kirshbaum, Assistant Federal Defenders, hereby submits his Post-Hearing Opening Brief, pursuant to
19 this Court's order. This response is based on the Points and Authorities below, as well as all pleadings
20 and exhibits already on file in this matter.

21
22 DATED this 12th day of September, 2014.

23 Respectfully submitted,

24 LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

25
26 By: /s/ Megan C. Hoffman
MEGAN C. HOFFMAN
27 Assistant Federal Public Defender

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

28

APP. 227

POINTS AND AUTHORITIES**I. INTRODUCTION**

On March 21, 2005, this Court dismissed Christian Walker (“Christian”)¹ *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 as untimely. (Clerk’s Record (“CR”) 20). This court concluded that evidence of Christian’s actual innocence was “not trustworthy.” (*Id.* at 4-5).

The Ninth Circuit granted Walker a certificate of appealability and appointed the Office of the Federal Public Defender to represent Christian. (CR 31, 39).

On October 29, 2012, the Ninth Circuit vacated the dismissal, concluding that this Court abused its discretion in rejecting Christian’s actual innocence claim without first holding an evidentiary hearing. (CR 41). Specifically, the Court held:

The circumstances surrounding the submission of Johnny Walker’s affidavit are consistent with its trustworthiness. This is unlike the typical case in which a petitioner claiming actual innocence presents suspiciously late affidavits ... that a court could deem inherently untrustworthy. Here, Johnny Walker’s affidavit is consistent with an affidavit that Walker’s attorney, John Fadgen, submitted in support of a severance motion before either Walker or Johnny Walker were tried. Fadgen’s affidavit states that he had “learned that if tried separately, Johnny Hughes Walker would testify that Christian D. Walker did not know that David Dimas was going to be shot.”

The district court reasoned that Johnny Walker’s affidavit was unreliable because it was drafted after his own acquittal of the attempted murder of Dimas and therefore “exposed him to no criminal liability” while exonerating Walker. In fact, however, Fadgen’s affidavit suggests that Johnny Walker offered testimony inculcating himself and exonerating Walker before his own trial. Fadgen’s affidavit therefore gives Johnny Walker’s statements an indicia of trustworthiness lacking in other cases involving “11th hour” affidavits produced long after the underlying criminal events. *Cf. Herrera v. Collins*, 506 U.S. 390, 423 (1993).

In addition, the trial record does not contradict Johnny Walker’s account of the shooting in a way that permitted the district court to conclude that, even if Johnny Walker had testified at trial consistently with his affidavit, the jury would not have believed him. No witness spoke directly about Walker’s intent to kill Dimas, and no witness testified that Johnny Walker acted on Walker’s instruction and not on his own impulse. Given this state of the record, it would be inappropriate for a court on collateral review to decide the contested issue of Johnny Walker’s credibility “based on affidavits alone.” *Buffalo v. Sunn*, 854 F.2d 1158, 1165 (9th Cir. 1988); *see also Roy v. Lampert*, 465 F.3d 964, 975 (9th Cir. 2006).

For these reasons, an evidentiary hearing is required to determine whether Johnny Walker’s newly presented testimony makes it more likely than not that no reasonable juror would convict Walker.

¹ To avoid confusion between Christian and Johnny Walker, counsel will refer to each man by his first name.

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1 (CR 41 at 5-6).

2 On July 9, 2014, the evidentiary hearing was held. (CR 71, 74). The evidence presented at the
3 evidentiary hearing establishes that Christian is actually innocent of the crime under the *Schlup* standard.
4 Johnny made clear at the hearing that he acted alone when he shot Dimas. Christian had no knowledge
5 of Johnny's plan and did not even know that Johnny was carrying a gun. Johnny's testimony that he
6 acted alone was reliable as it was consistent with the statements that he made throughout this case, which
7 included a statement he made to his uncle before his arrest and those that he made in a letter to
8 Christian's attorney immediately after his arrest. Further, Johnny's testimony was consistent with the
9 evidence at trial. Overall, it is clear that, looking at the record as a whole in conjunction with Johnny's
10 testimony at the hearing, it is more likely than not that no reasonable juror would find Christian guilty
11 of attempted murder.

12 **II. STATEMENT OF FACTS**

13 **A. Motion to Sever**

14 Christian and Johnny were charged with attempt murder with use of a deadly weapon and battery
15 with use of a deadly weapon under an aiding and abetting theory based on allegations that, on September
16 22, 1997, Johnny shot David Dimas and that Christian either aided and abetted or conspired with Johnny
17 in the shooting. (Ex. 10 at 120 (18-20)).²

18 In April 1998, Christian's attorney, John Fadgen, moved to sever the two trials. (Ex. 3). In the
19 motion, Fadgen argued that it was Christian's intention to call Johnny as a witness because Johnny's
20 testimony would "absolve [Christian] of any guilt in this case." (*Id.* at 9). However, if the trials
21 remained joined, then Johnny would invoke his Fifth Amendment privilege against self incrimination.
22 (*Id.*). If the trials were severed, then Johnny would offer testimony exculpating Christian. (*Id.* at 12).
23 Fadgen argued that, to ensure a fair trial, a severance should be granted to allow Johnny's "exculpatory
24 testimony to be adduced at a severed trial." (*Id.* at 10.) Fadgen signed two affidavits in support of the
25

26 ² Citations to exhibits 1-32 are to the exhibits admitted as part of the consolidated exhibit
27 list, which are set forth in CR 73. Page citations are to the bates stamp on each page. Where a citation
28 is to a page that has four transcript pages per page, the exact page of the transcript will be put in
parentheses. Exhibits 33, Johnny's NDOC offender information summary, and 34, Johnny's 2002
affidavit, were admitted during the hearing and are not bates stamped.

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1 motion. (Ex. 3 at 12; Ex. 5). In both, he indicated his belief that, if called to testify, Johnny would offer
2 exculpatory evidence in favor of Christian, namely that Christian “did not know that David Dimas was
3 going to be shot.” (Ex. 5; *accord* Ex. 3 at 12). Johnny’s attorneys joined the motion. (Ex. 4).

4 After the State opposed the motion, both Fadgen and Johnny’s attorneys replied. Fadgen argued
5 that the case was similar to those cases where a severance was granted because a co-defendant intended
6 to offer exculpatory evidence for the defendant. (Ex. 6 at 23.) He explained, “[i]f severed and Johnny
7 Walker is tried first he would testify at Christian[’s] trial that Christian [] did not know and was not
8 aware that David Dimas would be shot, the likelihood of him testifying to this fact can be corroborated
9 by his counsel.” (*Id.*) Johnny’s attorneys corroborated that Johnny had a desire to testify and that,
10 although Johnny would not concede that he committed “the exact offense as charged in the case at bar,”
11 Johnny agreed that “there is a reasonable likelihood that if he were to testify [the] likelihood of Christian
12 [] being convicted of any of the charges would be substantially reduced.” (Ex. 7 at 80).

13 After the motion to sever was granted, Christian included Johnny on his witness list. (Ex. 8.)

14 **B. Johnny’s Trial**

15 **1. State Serves Fadgen with Subpoena**

16 In October 1998, Johnny was tried and convicted prior to Christian. Johnny was actually tried
17 twice, after the first trial in June 1998 ended in a mistrial.

18 During a break in the first trial, attorney Thomas Pitaro addressed the court on behalf of Fadgen.
19 (Ex. 9 at 109). He stated that Fadgen had been in the courtroom observing Johnny’s trial on behalf of
20 Christian. While in the courtroom, the State served a subpoena upon Fadgen, ordering him to appear
21 as a witness in Johnny’s trial. Pitaro asked that the subpoena be quashed. (*Id.* at 110). The prosecutor,
22 Lisa Luzaich, indicated that Fadgen would be a rebuttal witness in case Johnny chose to testify in order
23 to impeach him. (*Id.* at 112). She explained that Fadgen had stated, “under oath,” that Christian
24 intended to call Johnny as a witness “to testify that Christian [] knew nothing about the fact that Johnny
25 [] was going to shoot David Dimas.” (*Id.*) The court granted the motion to quash. (*Id.* at 114).

26 **2. Evidence at Johnny’s Trial**

27 The testimony at Johnny’s trial was substantially similar to the testimony at Christian’s trial. In
28 sum, Christian had been smoking marijuana with Dimas and others in the afternoon of September 22,

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1 1997. After Christian left, he realized that his necklace was missing. He confronted Dimas and another
2 individual who was present, believing that they had stolen the necklace. Neither one claimed to have
3 it. That night, Dimas and a friend, Brandon Douzat, were outside Dimas's house smoking a cigarette.
4 As a matter of "coincidence" (Ex. Ex. 11 at 179 (116)), Christian and Johnny walked up to them. They
5 went across the street and smoked marijuana that Johnny had brought. After they smoked, they decided
6 to go their separate ways. When Dimas went to shake Johnny's hand, Johnny grabbed his hand, pulled
7 out a gun, and shot him in the neck as Dimas pulled his head away. (*See generally* Ex. 10 at 123-24 (29-
8 35); Ex. 13 at 261-66 (20-40)).

9 Nevertheless, there were some important differences in the evidence between Johnny's and
10 Christian's trial. First, Dimas testified that he was not "scared" or "worried about anything" when he
11 went to smoke marijuana with Christian and Johnny. (Ex. 11 at 196 (184)). Second, Dimas's mother,
12 Raina Chavez, was called as a State's witness at Johnny's trial, but not at Christian's. She testified that
13 Dimas described to her what happened at the time of the shooting. According to Chavez, she asked
14 Dimas where Christian was "in all this?" He answered, "Chris was just standing off to the side." (Ex.
15 11 at 204 (215)).

16 Also, an important element of the State's case against Christian at his trial was testimony from
17 Josh Martinez that Christian allegedly boasted to him that he had shot Dimas. (Ex. 20 at 620).
18 However, at Johnny's trial, the State argued that this statement should be precluded because, "[a]s the
19 State, we can provide evidence to this court that these statements are clearly untrustworthy." (Ex. 12
20 at 223 (33-34)). The State indicated that the statements were made while Christian and Martinez were
21 drinking beer and smoking marijuana. According to Martinez, Christian had a reputation for lying. (*Id.*
22 (34); *see also Id.* at 226 (48)). More important, Martinez indicated that Christian immediately recanted
23 the statement and added, "I'm just messing with you." (*Id.* at 223 (34)). The State argued that it had
24 presented "strong indicia of the untrustworthiness of this statement." (*Id.* at 224 (37)). Martinez took
25 the stand outside of the presence of the jury and, consistent with the State's statement, testified that
26 Christian immediately recanted after making the statement that he shot Dimas. (*Id.* at 226 (46)). This
27 additional statement did not come out at Christian's trial.

28 ///

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The court at Johnny's trial concluded that "the totality of the circumstances do not lend any reliability to this statement." (Ex. 12 at 229 (59)). Despite this ruling and the State's arguments that the statement was untrustworthy, the State affirmatively used this statement at Christian's trial to prove that he was guilty. (Ex. 20 at 620, 732).

At the close of his second trial, Johnny was acquitted of attempt murder, but convicted of battery.

C. Johnny's Sentencing

Prior to Johnny's sentencing, a presentence report was created. Attached to the report was a handwritten note from Johnny. (Ex. 32). He wrote, "I never committed this crime. That's [sic] why I took it to trial." (*Id.*)

Sentencing occurred on October 20, 1998. At sentencing, Johnny spoke, and on two occasions, indicated that he "did not commit this crime." (Ex. 15 at 282 (9, 15)).

Johnny's attorney filed a notice of appeal on his behalf. (Ex. 26).

D. Christian's Trial

1. Subpoena for Johnny

On October 23, 1998, three days after Johnny's sentencing, Fadgen submitted an *ex parte* motion seeking that a subpoena be issued for Johnny. (Ex. 16). He argued that "the evidence of the above-named witness is material to the defense, the Defendant cannot safely go to trial without the witness." (*Id.*) On October 27, 1998, an *ex parte* order for the issuance of subpoena, signed by a district court judge, was filed. (Ex. 17).

2. Trial Testimony

Christian's trial began on October 27, 1998 with jury selection. (CR 56, Ex. 4, p. 61). The State's theory at trial was that Johnny was the one who shot Dimas and that he did it because Christian wanted him to. (Ex. 18 at 305, 306, 315). The evidence at trial established the following:

In the afternoon of September 22, 1997, *David Dimas* was at his house with Christian, *Mysty Fuller*, Maureen McConaha, and *Lionel Hernandez*.³ (Ex. 18 at 325-26). Dimas had just met Christian on that day. (*Id.* at 330, 389). The group decided to go across the street to a school to smoke marijuana.

³ Names that are italicized represent individuals who testified at trial.

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1 (*Id.* at 327; Ex. 19 at 461, 514-15). While they were smoking, Hernandez asked Christian if he could
2 see a gold necklace he was wearing. (Ex. 18 at 332-33; Ex. 19 at 516). Christian took off the necklace
3 and it got passed around. (Ex. 18 at 333; Ex. 19 at 465). The last thing that Dimas remembered was that
4 Hernandez had the necklace in his hand. (Ex. 18 at 395). A short while later, Christian, Mysty, and
5 Maureen left. (Ex. 18 at 332; Ex. 19 at 466).

6 About twenty to thirty minutes later, Christian returned to Dimas's house asking for his necklace.
7 (Ex. 18 at 334). Dimas told him that he did not know where the necklace was. (*Id.*). Dimas helped
8 Christian look for it in Dimas's house and at the school. (*Id.* at 47). Then they went to Hernandez's
9 house to look for it. (Ex. 19 at 467). Hernandez also claimed that he did not know where the necklace
10 was. Hernandez went with them to Dimas's house to look for the necklace again. (Ex. 18 at 335-36;
11 Ex. 19 at 467). They could not find the chain. When Christian left Dimas's house in the early evening,
12 he said, "I ain't going out like no punk." (Ex. 18 at 338). Nevertheless, Dimas did not believe that
13 Christian was mad at him; he believed that Christian had left on good terms. (*Id.* at 408). A little while
14 later, Christian and his mother arrived at Dimas's house. (*Id.* at 338). Christian's mother said that she
15 was going to sue Dimas. They left after about ten minutes. (*Id.* at 339). Christian and his mother went
16 to Hernandez's house that night. Christian was upset and disappointed. Christian's mother was mad.
17 (Ex. 19 at 468-69). They were accusing him of stealing the necklace. (*Id.* at 481). Dimas had also
18 indicated that he thought Hernandez had the necklace. (*Id.*). At around 7:39 p.m., Christian called the
19 police, reporting that he had given his necklace to a friend who refused to return it. He asked that the
20 police accompany him to get his necklace back. (Ex. 19 at 451-55).⁴

21 During the evening of September 22, 1997, *Brandon Douzat* went over to Dimas's house. They
22 hung out for a couple of hours and, at around 10:45 to 11:00 p.m, they went outside Dimas's house so
23 that Dimas could smoke a cigarette. (Ex. 18 at 340-41; Ex. 19 at 530-31). While they were standing
24 at the foot of Dimas's driveway, Christian and another person walked up to them. (Ex. 18 at 342; Ex.
25 19 at 532). When Dimas saw Christian, he was afraid that he was going to have to fight Christian. (Ex.
26 18 at 344). Christian introduced the other person as "John" or "Johnny"; Dimas and Douzat had never

27
28 ⁴ The State admitted evidence of the call through *Karen Pierce*, a communications expert with Las Vegas Metro Police. (Ex. 19 at 4.)

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1 met him before. (Ex. 18 at 347; Ex. 19 at 533, 536). Johnny was Christian's cousin and had lived in
2 Christian's house on and off for a few years. (Ex. 19 at 509-11). Either Johnny or Christian asked if
3 Dimas and Douzat wanted to smoke some weed. (Ex. 19 at 534). Johnny was the one who had the
4 marijuana. (Ex. 18 at 409; Ex. 19 at 536, 559). Dimas wanted to smoke in front of his driveway, but
5 either Christian or Johnny wanted to go to the school to smoke. (Ex. 18 at 345). Inconsistent with his
6 testimony at Johnny's trial, Dimas testified that he was a "little nervous" to go with them to the school,
7 but he was not worried because he did not believe that Christian would "do something." (*Id.* at 412).
8 As they were going to the school, Dimas told Christian that he did not have his chain. Christian told him
9 that he did not think he had the chain. (*Id.* at 346, 420).

10 Once at the school, Douzat rolled a joint and Douzat, Dimas, and Christian smoked it; Johnny
11 did not smoke any of it. (Ex. 18 at 348; Ex. 19 at 536-37, 560). After they finished smoking, Douzat
12 shook everyone's hand and began to walk away. (Ex. 19 at 537). Dimas reached out his right hand to
13 Johnny to shake his hand. Johnny grabbed Dimas's right hand with his left hand and pulled him close.
14 Dimas saw that Johnny had his right hand down by his pants. Dimas then saw Johnny point a gun at his
15 face. Dimas threw his head to the left when he saw the gun. Johnny then shot Dimas in the neck below
16 his right ear. (Ex. 18 at 349-53). The wound was superficial. (Ex. 19 at 499). Dimas and Douzat did
17 not hear Christian say anything to Johnny before Johnny fired the gun. (Ex. 18 at 376, 410, 421; Ex. 19
18 at 564). Johnny and Christian ran off together. (Ex. 19 at 538).

19 One sentence from a letter from Christian to Tawsha Orrillo was admitted into evidence. The
20 sentence reads, "my cousin and I are way tighter than that." (Ex. 19 at 589; *see also* Ex. 30).

21 *Josh Martinez* was called as a witness for the State. (Ex. 20 at 617). According to Martinez,
22 Christian told him that some guy had tried to steal his necklace, and that Christian shot him in the neck.
23 (*Id.* at 620).

24 The jury convicted Christian of attempt murder. (Ex. 21 at 742).

25 **E. Johnny's Affidavit**

26 In September 2002, Johnny signed an affidavit in which he stated that, in October 1997, he
27 "contacted via letter" Fadgen regarding this case. (Ex. 34). He indicated in the letter the following:
28

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That Christian Walker told me he thought either Lionel or David stole his necklace. I listened and watched his torment at having lost his necklace. He then told me its not that important, its only a material item, and the necklace could be replaced. While I observed him agonizing over the necklace, I had already decided that I would get the necklace back for him. I never told him my thoughts on the matter, I kept my feelings to myself.

Since Christian was in a better mood we decided to go to a friend's house. On the way over there, we ran into David Dimas, one of the people who may have stolen the necklace. We started talking to him and his friend Brandon. We all went over to the nearby school and smoked some marijuana. Something about his behavior rubbed me the wrong way. He was smug, as if he had gotten away with stealing the necklace. Without thinking I shot at him and hit him. I could see Christian was scared, he didn't move, he just stood there with a stunned look on his face as David ran off. I told him lets go and we left.

(*Id.*).

F. This Court's Prior Decision and Ninth Circuit Remand

As mentioned in the Introduction, *supra*, on March 21, 2005, this Court originally dismissed Christian's *pro se* habeas petition as untimely. (CR 20). This Court concluded that evidence of Christian's actual innocence was "not trustworthy." (*Id.* at 4-5).

On October 29, 2012, the Ninth Circuit vacated the dismissal, concluding that this Court abused its discretion in rejecting Christian's actual innocence claim without first holding an evidentiary hearing. (CR 41).

G. Evidentiary Hearing

1. Johnny Walker

Johnny Walker testified that he is Christian's cousin; their fathers are brothers. (CR 74 at 6). He lived with Christian and Christian's parents, Annette and Gerald Walker, and other foster children in the Walker home between the ages of 5 and 11 and then for a short period of time between the ages of 16 and 18. (*Id.* at 6-7). The Walkers lived in a house on Terra Linda but also ran a senior citizen home on Bracken Avenue. (*Id.* at 8, 17-18). At the time that Johnny was arrested, Johnny was living across the street from the Walkers' house on Terra Linda in an apartment. (*Id.* at 8).⁵ Johnny is

⁵ Johnny put a different address on his intake sheet at the time of his arrest. (Ex. 1). Johnny could not remember what the address was. (CR 74 at 22-24). While the form indicated that he had been living with an individual named Tasha, he did not recognize that name. (*Id.* at 24).

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1 currently housed at Ely State Prison; he has four felony convictions. (*Id.* at 9-10).

2 On the night of September 22, 1997, Johnny shot David Dimas. (CR 74 at 10). Earlier that
3 night, Johnny had a conversation with Christian in Christian's front yard at the house on Terra Linda
4 about a stolen necklace. Christian told him what had happened, namely that he was hanging out with
5 David, Lionel, Maureen and Mysty and he took off his necklace; he passed it around and then nobody
6 knew where it was. Christian indicated that he believed that a kid named Lionel had stolen the necklace.
7 (*Id.* at 10-11, 57-58). When he was relaying the story, Christian seemed both hurt and angry that one
8 of his friends would take the necklace. (*Id.* at 11, 59). This made Johnny feel "kind of angry" because
9 Christian was his cousin and they were "pretty close." (*Id.*).

10 After Christian told Johnny about the necklace, Christian's pager went off. Christian went inside
11 his house and, about five minutes later, came out and told Johnny that he was going to go to a girl named
12 Tawsha's house. (CR 74 at 11). He asked Johnny if he wanted to come along in order to meet Tawsha's
13 sister Angel. Johnny agreed to come. (*Id.*)

14 Johnny was carrying a gun that night. (CR 74 at 12). He did not tell Christian he was carrying
15 a gun. (*Id.*). The gun was a .22 semi-automatic pistol. (*Id.*). Johnny typically carried a gun, but he
16 never told anyone he was carrying a gun. (*Id.* at 64-65).

17 Christian and Johnny began to walk over to Tawsha's house. (CR 74 at 12). Johnny did not
18 know where Tawsha lived; he was just following Christian. (*Id.* at 61). On their way over to Tawsha's,
19 they ran into David and Brandon, who were standing in front of David's house. (*Id.* at 12, 66). Johnny
20 had never met them before. (*Id.*). Christian and Johnny had not planned on meeting up with Brandon
21 and David on that night. (*Id.* at 12, 84). As they approached, David said to Christian that he did not take
22 his necklace. (*Id.* at 13). Christian responded that he did not think that David took his necklace. He
23 believed that Lionel had taken it. (*Id.*). When he heard David mention the necklace, Johnny decided
24 that he was going to try and get further information from David. He believed that, even if David had
25 not taken the necklace, David would have further information about who did. (*Id.* at 13, 67). At that
26 point, Johnny hatched the plan to scare David with his gun. Johnny was going to threaten David by
27 pointing it at him in order to force David to tell him where the necklace was. (*Id.* at 14). Christian did
28 not know that Johnny was going to scare David with the gun. (*Id.*).

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1 Pursuant to this plan, Johnny decided to lure David across the street to smoke marijuana. (CR
2 74 at 14). Johnny pulled out his marijuana and asked David if he wanted to smoke it, hoping that this
3 would make David feel comfortable. (*Id.*). Johnny also suggested that they go to the park across the
4 street to smoke. Johnny wanted to move across the street because he did not want to scare David with
5 the gun in front of David's house where David's family could see. (*Id.* at 14-15). They went across the
6 street and Brandon rolled a joint. Brandon, David, and Christian smoked the marijuana; Johnny did not.
7 (*Id.* at 15).

8 After they had smoked, everyone began shaking hands to say goodbye. Christian shook
9 Brandon's hand and Johnny went to shake David's hand. (CR 74 at 15). When David reached out his
10 hand, Johnny "clamped onto it." (*Id.*). At the same time, Johnny pulled the gun out with his left hand
11 to scare him. Johnny is left-handed. Johnny pointed the gun at David's "face area." In response, David
12 flinched back. Johnny tensed up on the trigger finger and shot him in the neck. (*Id.* at 15-16). Johnny
13 did not intend to shoot the gun. He pulled the trigger by accident. (*Id.* at 17). He never told Christian
14 that he was going to shoot the gun. (*Id.*).

15 After the gun went off, Johnny looked over at Christian. He looked "shocked" and "surprised."
16 (CR 74 at 16-17). Christian was "frozen" in place and didn't move. (*Id.* at 16). Johnny pushed him in
17 the back and said, "Let's go." (*Id.*). They ran away from the scene together. (*Id.* at 17).

18 Overall, Johnny denied that he and Christian conspired to shoot David. (CR 74 at 20). He and
19 Christian "never" made a plan to shoot David. (*Id.*). He never communicated to Christian about his plan
20 was for scaring David. (*Id.*). He "of course" acted on his own when he shot David. (*Id.*). He was
21 "[w]ithout a doubt" the only person responsible for shooting David. (*Id.* at 21). Johnny was a "bad
22 influence" on Christian. Johnny felt bad that he got Christian involved in this because Christian was
23 "innocent. He - - he had nothing to do with this." (*Id.* at 28).

24 After the incident, Johnny spoke with Christian's father Gerald about what happened. (CR 74
25 at 17). The conversation took place at the Bracken house on one of the mornings before Johnny was
26 arrested. (*Id.* at 18). He told Gerald that he shot David and that Christian had nothing to do with it. He
27 explained, "I tried, you know, to find this necklace in my way, and it just kind of backfired on me, you
28 know." (*Id.*).

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1 After the arrest, which was about two weeks after the shooting, Johnny wrote a letter to
2 Christian's attorney, Fadgen. (CR 74 at 18-19, 46). He stated in the letter that he wanted to take full
3 responsibility for what he did and that Christian had nothing to do with it. He was willing to testify at
4 Christian's trial. (*Id.* at 18-19, 49). Johnny wrote the letter out when he was in a cell on the ninth floor
5 of the Clark County Detention Center and then gave it to Christian to give to Fadgen. (*Id.* at 19, 44-45,
6 54, 56).

7 Johnny and Christian had separate trials. Johnny's trial was first. After he was convicted, his
8 attorney filed a notice of appeal on his behalf. He did not order his attorney to do it. (CR 74 at 19).
9 Once the Nevada Supreme Court had affirmed the conviction, Johnny did not file a post-conviction
10 petition. He explained that he gave up on the case because he understood that he was responsible for
11 shooting Dimas and had to accept the punishment. (*Id.*).

12 At the time of the 2014 hearing, Johnny had not seen Christian in 10 years. (CR 74 at 33). They
13 had both been at Ely together and, for a month, had been cell mates. (*Id.* at 34). However, they
14 "couldn't live together," so they found different people to live with. (*Id.*). During cross-examination,
15 Respondents sought to question Johnny about information contained on Walker's offender information
16 summary. (*Id.* at 40; *see also* Ex. 33). Christian's attorneys objected on relevance grounds.
17 Respondents explained:

18 Your Honor, we have been trying to establish bias; *opportunity to*
19 *fabricate*. It's impeachment evidence. *We've already established the fact*
20 *that they were cellies. That they were at prison - - at Ely State Prison*
together in 2004. And the timing of this relates with other pleadings that
have already been submitted to the Court.

21 (*Id.* at 41 (emphasis added)). The objection was overruled. (*Id.*). Respondents questioned Johnny about
22 his 2002 affidavit. (*Id.* at 41-48). Johnny explained that a law clerk named Rashid approached him at
23 Christian's behest to talk to him about the case. Johnny told him what happened and the law clerk typed
24 it up "in the legal manner." (*Id.* at 47, 50-51, 83). He acknowledged that the wording in the affidavit
25 was not necessarily his. (*Id.*). However, he did not talk to Christian at all in putting the affidavit
26 together. (*Id.* at 49).

27 Johnny explained that, when he made his statements in the presentence report and at sentencing
28 that he did not commit the crime, he meant that he did not intend to shoot David so the conviction for

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1 battery did not “fit[] what really happened.” (CR 74 at 80, 84).

2 **2. Gerald Walker**

3 *Gerald Walker* is Christian’s father and Johnny’s uncle. (CR 74 at 130-32). At the time of the
4 hearing, he lived at a house on Bracken Avenue that used to be a senior citizen home. He also used to
5 own a house on Terra Linda. (*Id.* at 131).

6 Before Johnny and Christian had been arrested for the David Dimas incident, Gerald had a
7 conversation with Johnny about what happened.⁶ (CR 74 at 134-40). Gerald was at the house on
8 Bracken Avenue. Christian was also in the house as he was helping him paint inside the house. Gerald
9 received a phone call from a family member informing him that Johnny and Christian had been involved
10 in a shooting. Gerald called up his brother, Johnny’s father, and asked him to bring Johnny over to the
11 Bracken house. (*Id.* at 134-35). Gerald’s brother brought Johnny to the house and Gerald spoke with
12 Johnny. (*Id.* at 135). Gerald asked Johnny what happened. Johnny said that he shot Dimas but that it
13 was an accident. (*Id.* at 140). Johnny said that he pulled out the gun to scare Dimas. (*Id.*). Christian
14 did not know anything about Johnny’s plan. (*Id.*). Gerald had not previously mentioned this
15 conversation to anyone because no one had ever asked him about his knowledge of the case. (*Id.*).

16 **3. Ken Lake**

17 *Ken Lake* testified that he is an inmate at Southern Desert Correctional Center. (CR 74 at 89).
18 He also goes by the name Rashid. (*Id.*). He met Christian when they were housed together at Ely State
19 Prison in approximately 2002. (*Id.* at 91, 93, 101).

20 At the time, Lake was employed as a prison law clerk. (CR 74 at 91). In connection with that
21 employment, Lake assisted Christian with his attempt murder litigation, including drafting his *pro se*
22 state habeas petition. (*Id.* at 92-93, 102). While drafting the habeas petition, Lake reviewed Christian’s
23 legal paperwork and learned of Johnny’s involvement in the case. Lake believed it was important to
24 speak with Johnny about the case because:

25 ///

26 _____
27 ⁶ Respondents objected to Gerald’s testimony. (CR 74 at 133). Petitioner argued that it
28 was admissible as non-hearsay under Rule 801(d)(1)(B) to rebut a claim of recent fabrication. (*Id.* at 134, 137). This Court allowed the testimony, but accorded Respondents the opportunity to move to strike it at a later time. (*Id.* at 138).

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1 he was [Christian's] co-defendant, you know, and I wanted to make sure – you know, test
 2 the facts and make sure this is how he seen it. This is what happened. This is what didn't
 happen.

3 And – and, you know, different legal issues to see, you know, his perspective on how
 4 things occurred and what happened, you know, and trying to get at the truth, more or less.

5 (*Id.* at 94).

6 While speaking with Lake, Johnny admitted that he was the shooter, “what he told me is that he
 7 did it. You know, he was the one who – who more or less was guilty of the crime.” (CR 74 at 95). Lake
 8 inquired whether Johnny had told anyone, and Johnny responded that “he had been trying to tell people
 9 from day one and nobody listened.” (*Id.*). Lake therefore decided it was important to obtain a signed
 10 affidavit from Johnny. (*Id.*)

11 Lake drafted an affidavit containing Johnny's explanation of the Dimas shooting. (CR 74 at 95-
 12 97; Ex. 34). The affidavit was a “mixture” of both his and Johnny's words. (*Id.* at 97). Lake observed
 13 Johnny sign the affidavit. (*Id.*).

14 4. Elissa Luzaich

15 *Elissa Luzaich* testified that she has been employed with the Clark County District Attorney's
 16 Office for twenty years. (CR 74 at 103). She tried Christian and Johnny in the David Dimas shooting
 17 case in the fall of 1998. (*Id.* at 104-05). She also represented the State at Johnny's sentencing hearing
 18 on October 20, 1998. (*Id.* at 112-3).

19 Luzaich recalled that Fadgen moved to sever the trials, based on “information and belief” that
 20 “Johnny Walker would take the stand and would say that he did it, and that Chris had no knowledge of
 21 anything.” (CR 74 at 106; *see also* Exs. 3, 5, 6-7, 9). She acknowledged that she and Fadgen had a
 22 conversation about Johnny's testimony either right before or during Christian's trial, but she did not have
 23 an independent recollection about what was said. (CR 74 at 117).

24 III. ARGUMENT

25 A. Actual Innocence Can Serve as a Gateway to a Merits Review of an Untimely 26 Federal Habeas Petition.

27 The United States Supreme Court recently held that a plea of “actual innocence, if proved, serves
 28 as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as

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1 in this case, expiration of the statute of limitations.” *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928
2 (2013).

3 To establish a claim of actual innocence to overcome an untimely petition, a petitioner must
4 show that, in light of all the evidence including the new evidence, “it is more likely than not that no
5 reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Schlup v. Delo*, 513
6 U.S. 298, 327-28 (1995). Actual innocence may be proved through the presentation of *any* newly
7 presented - not necessarily newly discovered - evidence. *House v. Bell*, 547 U.S. 518, 538 (2006)
8 (“Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the
9 federal court to assess how reasonable jurors would react to the overall, newly supplemented record.”).
10 Further, the Supreme Court has rejected any “court-fashioned diligence barrier” to obtain review of an
11 actual innocence claim. *McQuiggin*, 133 S.Ct. at 1935; *see also Cooper v. Woodford*, 358 F.3d 1117,
12 1119 (9th Cir. 2004) (“[t]here is no requirement under *Schlup* that the factual claim was not discoverable
13 through the exercise of due diligence.”).

14 “[A]s the *Schlup* decision explains, the gateway actual-innocence standard is ‘by no means
15 equivalent to the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), which governs claims of
16 insufficient evidence.’” *House v. Bell*, 547 U.S. 518, 538 (2006); *accord Lee v. Lampert*, 653 F.3d 929,
17 938 n.13 (“*Schlup* incorporates the standard of proof of *Murray v. Carrier*, 477 U.S. 478 (1986), and
18 therefore involves a different inquiry than mere sufficiency of the evidence.”). “Thus, though under
19 *Jackson* the mere existence of sufficient evidence to convict would be determinative of petitioner’s
20 claim, that is not true under” the gateway actual innocence standard. *Schlup*, 513 U.S. at 330; *see also*
21 *Lampert*, 653 F.3d at 938 n.13.

22 While the *Schlup* standard permits review only in the extraordinary case, it “does not require
23 absolute certainty about the petitioner’s guilt or innocence.” *Lampert II*, at 938. A petitioner does not
24 have to demonstrate at the gatekeeping stage that he will ultimately prevail on a showing of actual
25 innocence. As noted by the Ninth Circuit:

26 As we have previously said, “where post-conviction evidence casts doubt on the
27 conviction by undercutting the reliability of the proof of guilt, but not by affirmatively
28 proving innocence, that can be enough to pass through the *Schlup* gateway to allow
consideration of otherwise barred claims.”

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1 *Id.* (internal citations omitted); *see also McQuiggin*, 133 S.Ct. at 1936 (“The gateway should only open
2 when a petition presents ‘evidence of innocence so strong that a court cannot have confidence in the
3 outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional
4 error.’”) (quoting *Schlup*, 513 U.S. at 316).

5 Just as important, the analysis under *Schlup* is predictive – a court must make a holistic
6 assessment of how a reasonable juror would view all of the evidence in the record. As the Supreme
7 Court explained in *House*:

8 Deference is given to a trial court’s assessment of evidence presented to
9 it in the first instance. Yet the *Schlup* inquiry, we repeat, requires a
10 holistic judgment about all the evidence, and its likely effect on
11 reasonable jurors applying the reasonable-doubt standard. As a general
12 rule, the inquiry does not turn on discrete findings regarding disputed
13 points of fact, and it is not the district court’s independent judgment as to
14 whether reasonable doubt exists that the standard addresses. Here,
although the District Court attentively managed complex proceedings,
carefully reviewed the extensive record, and drew certain conclusions
about the evidence, the court did not clearly apply *Schlup*’s predictive
standard regarding whether reasonable jurors would have reasonable
doubt.

15 *House*, 547 U.S. at 539-40 (quotation marks and citations omitted).

16 **B. In Nevada, the Crime of Attempt Murder with Use of a Deadly Weapon Requires**
17 **Proof That the Defendant Acted with Specific Intent.**

18 In Nevada, attempt murder with use of a deadly weapon is a specific intent crime. The defendant
19 must act with “express malice, namely, with the deliberate intention unlawfully to kill.” *Keys v. State*,
20 766 P.2d 270 (Nev.1988); *see also Nev. Rev. Stat. § 193.330*. In order for a person to be held
21 accountable for a specific intent crime as an aider or abettor, that person must have acted “with the intent
22 that the other person commit the charged crime.” *Sharma v. State*, 56 P.3d 868, 872 (Nev. 2002).
23 Further, “a defendant may not be held criminally liable for the specific intent crime committed by a
24 coconspirator simply because that crime was a natural and probable consequence of the object of the
25 conspiracy.” *Bolden v. State*, 124 P.3d 191, 200 (Nev. 2005).

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27 ///

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C. The Evidence Presented at the Evidentiary Hearing Establishes That it Is More Likely than Not That No Reasonable Juror Would Find Christian Guilty of Attempt Murder with Use of a Deadly Weapon.

The evidence presented at the evidentiary hearing proves that “it is more likely than not that no reasonable juror would have found [Christian] guilty [of attempt murder with use of a deadly weapon] beyond a reasonable doubt.” *Schlup*, 513 U.S. at 327-28. As outlined below, Christian has presented evidence proving that under Nevada law, he is actually innocent of the charges against him.

Johnny’s testimony at the evidentiary hearing established this. Johnny testified that it was his plan, and his plan alone, to use the gun to scare Dimas. Johnny explained that, earlier in the night of September 22, 1997, Christian had told him about the stolen necklace. Christian believed that a kid named Lionel Hernandez had the necklace. Johnny and Christian are cousins and had a pretty close relationship. Johnny could see that Christian was upset about the stolen necklace, which made Johnny angry. After receiving a page from a girl named Tawsha, Christian and Johnny began to walk over to Tawsha’s house to meet her and her sister Angel. Johnny did not know where she lived and followed Christian. On their way over to Tawsha’s house, he and Christian coincidentally ran into Dimas. Johnny had never met him before.

Christian and Johnny approached David. Dimas said something to Christian about the necklace. At that point, Johnny hatched the plan to use his gun to scare Dimas in order to try and get information from Dimas. Johnny understood that Christian was accusing Lionel of stealing the necklace. But Johnny believed that Dimas had to have more information. It was Johnny’s idea, and his idea alone, to lure Dimas across the street with the promise of marijuana in order to threaten him with a gun to get more information about the necklace. Unfortunately, Johnny’s plan backfired when he accidentally shot the gun after Dimas pulled away from him. Nevertheless, Johnny’s actions left Christian surprised and in a state of shock. Christian was frozen in place.

This testimony definitively established that Christian is innocent. Johnny emphasized that Christian did not know about his plan to scare Dimas. It was solely Johnny’s idea, which he did not share with Christian. In fact, Johnny did not even come up with the idea until he had reached Dimas’s house. Thus, it was impossible for Christian to have known about the plan. Further, Johnny had not even told Christian that he was carrying a firearm. As Johnny made clear at the hearing, there was no

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1 plan to shoot Dimas. It was solely Johnny's idea to lure them across the street. Christian knew nothing
2 about what Johnny intended. Johnny never communicated the plan to Christian. Further, the motive
3 for the shooting was obvious: Johnny was angry that someone had stolen his cousin's necklace, which
4 had made his cousin upset. Although it was exceedingly misguided, Johnny developed a plan on his
5 own to try and help Christian by scaring Dimas with a gun. Johnny made clear that "of course" he acted
6 on his own when he shot David and he was "without a doubt" the only person responsible for shooting
7 David. As Johnny stated, Christian simply had nothing to do with the shooting. Christian's response
8 to the shooting – freezing in place with a surprised and shocked look on his face – shows without a doubt
9 that he really had no idea that a shooting would take place. As can be seen, Christian clearly did not
10 have the specific intent to murder Dimas, as required under Nevada law to be guilty of this crime.⁷

11 There are numerous compelling reasons as to why Johnny's testimony was reliable. As Lake
12 testified at the hearing, Johnny "had been trying to tell people from day one and nobody listened." (CR
13 74 at 95). Fadgen's affidavit in support of the motion to sever demonstrates the reliability of that
14 assertion. In support of his motion to sever, Fadgen stated under oath that Johnny desired to take the
15 stand and would testify that Christian knew nothing about the fact that Johnny was going to shoot
16 Dimas. (Ex. 9 at 112). And the reliability of that statement was supported in two critical ways. Outside
17 of counsel making the statement under oath, Johnny's attorney essentially corroborated that this would
18 be Johnny's testimony in his reply to the motion to sever. (Ex. 7 at 80). Further, the prosecutor herself
19 wanted to call Fadgen as a witness at Johnny's trial to impeach Johnny should Johnny take the stand and
20 deny responsibility. (Ex. 9 at 112).

21 Further, there was every indication that Fadgen did intend to call Johnny as a witness. After the
22 trials were severed, Fadgen included Johnny on his witness list. (Ex. 8). On the eve of trial, Fadgen
23 obtained a subpoena to call Johnny as a witness. (Exs. 16-17). Luzaich confirmed that, although she
24 could not remember the substance of the conversation, she and Fadgen did have a conversation about
25 Johnny's testimony either before or during Christian's trial.

26
27 ⁷ To note, based on Johnny's testimony, a specific intent to shoot Dimas would actually
28 have been impossible as Johnny indicated that, while he intended to point the gun at Dimas, he did not
intend to shoot Dimas. The shooting itself was an accident.

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1 All of these steps by Fadgen demonstrate that he had every reason to believe that Johnny would
2 provide favorable evidence for Christian, namely that Christian was not aware that Johnny was going
3 to shoot Dimas.

4 Gerald's testimony also demonstrates the reliability of Johnny's testimony. Within a week or
5 two of the shooting, Gerald had a conversation with Johnny in which Johnny explained to him that he
6 shot Dimas, but that it was accidental and that Christian knew nothing about Johnny's plan with the gun.
7 This testimony is important for two reasons. First, it demonstrates that Johnny's story about what
8 occurred has been consistent from the beginning. Second, this evidence rebuts any allegation of recent
9 fabrication. *See* Fed. R. Evid. 801(d)(1)(B).⁸ Johnny made this statement before any motive to lie arose.
10 It was made before he and Christian were even arrested. In fact, when it was made, Johnny had no
11 indication that Christian would even be arrested and charged for the shooting. It was also made long
12 before the alleged motive to fabricate occurred while Johnny and Christian were cell mates at Ely State
13 Prison in 2002, as Respondents argued at the hearing.

14 Johnny's testimony was reliable for additional reasons. First, it was consistent with Johnny's
15 2002 affidavit. As he did at the hearing, Johnny stated in the affidavit that he and Christian did not have
16 a plan to shoot Dimas. He acted alone and without thinking. Christian did not know about his plan.
17 That affidavit was prepared solely at the behest of law clerk Lake, who could tell from reviewing
18 Christian's legal file that Johnny was a critically important element of the case. Indeed, when Lake went
19 to speak with him, Johnny immediately informed Lake that he was the one who committed the crime.
20 Second, Johnny's decision not to pursue post-conviction relief further supports the reliability of his
21 testimony. While Johnny did appeal his conviction, the notice of appeal was filed by his attorney and
22 not at his direction. Nevertheless, once the conviction was affirmed, Johnny decided to take

23
24 ⁸ Christian easily meets the requirements for admitting Gerald's prior consistent statement
25 as non-hearsay under Rule 801(d)(1)(B): the statement is consistent with Johnny's hearing testimony;
26 Respondents alleged that Johnny's testimony was a recent fabrication (CR 74 at 41); and the statement
27 to Gerald pre-dated the motive to falsify. *See United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1996)
28 (under Rule 801(d)(1)(B), proponent must establish (1) the declarant must testify and be subject to cross-
examination; (2) there must be an express or implied charge of recent fabrication or improper influence
or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is
consistent with the challenged in-court testimony; and (4) the prior consistent statement must be made
prior to the time that the supposed motive to falsify arose).

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1 responsibility for the shooting and no longer fight the conviction. He understood that he was the one
2 responsible for the shooting, so he had to suffer the consequences.

3 Further, Johnny's testimony was highly consistent with the evidence at trial. Just as the Ninth
4 Circuit stated, the trial evidence did not contradict Johnny's testimony about what occurred. In fact, the
5 State made abundantly clear at trial that Johnny was the shooter. Johnny admitted that in his testimony.
6 Just as the witnesses at trial indicated, it was one of either Johnny or Christian who offered the marijuana
7 and suggested that they go across the street to smoke. Johnny confirmed in his testimony that he was
8 the one who did both. Johnny described the shooting in the exact same way that Dimas described it:
9 Johnny grabbed Dimas's hand, pulled him close, pointed the gun at his face, and then the gun fired after
10 Dimas jerked his head to the side. As the Ninth Circuit concluded, "No witness spoke directly about
11 [Christian's] intent to kill Dimas, and no witness testified that Johnny Walker acted on Walker's
12 instruction and not on his own impulse." (CR 41 at 6). The witnesses at trial testified that Christian did
13 not say anything to Johnny before he shot the gun, which is consistent with Johnny's explanation that
14 he acted alone. In fact, Dimas's mother testified at Johnny's trial that Dimas told her that Christian was
15 doing nothing more than standing there when Johnny shot the gun. It is fully consistent with Johnny's
16 description of what happened.

17 Further, the evidence at trial established that Christian believed that it was Hernandez who stole
18 the necklace, not Dimas. Hernandez specifically gave that testimony at trial. The evidence showed that
19 even Dimas believed that Hernandez had the necklace. Dimas testified that Christian specifically said
20 to him that he did not think that he took it. Indeed, Dimas testified at Johnny's trial that he was not
21 worried at all to go across the street to smoke the marijuana with Christian. He had no reason to be
22 based on the evidence that was presented at trial. Christian had confirmed that Dimas was not a suspect
23 in Christian's mind. Johnny's hearing testimony confirmed that Christian believed it was Hernandez
24 that took the necklace. Thus, there was absolutely no evidence that Christian was out to harm Dimas.
25 This is precisely why Johnny's testimony rings so true. It was solely Johnny who believed that Dimas
26 had any information about the necklace. Johnny was simply acting on his own when he developed his
27 own misguided plan to scare Dimas with a gun to get more information from him.

28 ///

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1 It must be emphasized that the State presented no direct evidence that Johnny and Christian had
2 developed a plan together to try and kill Dimas. Rather, the State asked the jury solely to draw that
3 inference. Clearly, Johnny's testimony destroys that inference. Moreover, no reasonable juror would
4 convict Christian of this crime *when his co-defendant specifically testifies that Christian was not*
5 *involved in the crime.*

6 In sum, Christian has met the *Schlup* standard. The evidence shows that, on the night of
7 September 22, 1997, Johnny, independently and without the knowledge of Christian, shot Dimas.
8 Christian did not even know that Johnny was carrying a weapon. There was no plan or conspiracy
9 between Christian and Johnny to aid, abet, shoot or murder Dimas. Christian did not have the specific
10 intent for Dimas to be shot, nor did he engage in any acts with the deliberate intention that Dimas be shot
11 or killed.

12 The State's evidence at trial does not overcome Johnny's definitive testimony that he acted on
13 his own when he shot Dimas. The most inculpatory evidence at trial was Christian's threat to Dimas
14 that he "ain't going out like no punk." However, there was absolutely no reason to believe that this was
15 intended as a violent threat. In fact, Christian's actions demonstrated the exact opposite. Rather than
16 resort to violence, Christian went and got his Mom to help him. His mother did not threaten violence,
17 but a civil lawsuit. When that did not work, Christian ran to the police for help, almost the exact
18 opposite of seeking violent revenge. Indeed, it makes no sense that Christian would try and harm anyone
19 after he called the police. By calling the police, Christian immediately made himself known to the police
20 as the number one suspect in any crime should anything happen to Dimas or Hernandez. He obviously
21 would have been aware of that. It would not be in his interest to then plan to go shoot Dimas.

22 Another piece of incriminating evidence at Christian's trial can be dismissed out of hand. The
23 State presented evidence from Josh Martinez that Christian claimed to have shot someone over his
24 necklace. However, even the State admitted at Johnny's trial that this testimony was fundamentally
25 untrustworthy. Moreover, Martinez acknowledged at Johnny's trial that Christian immediately recanted
26 this statement. Indeed, the statement was so unreliable that the judge at Johnny's trial refused to admit
27 it. Thus, there is absolutely no reliable basis on which to use this testimony against Christian.

28

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Finally, the jury would have no basis to reject Johnny's testimony.⁹ As shown above, it was reliable. He has consistently stated from the beginning of the case that he acted alone when he shot Dimas and that Christian had no knowledge of the shooting. The remaining evidence at trial did not contradict his testimony, and in fact, was consistent with it. Johnny's statements in his presentence report and at his sentencing that he did not commit this crime do nothing to undermine his credibility. As he explained at the hearing, when he made those statements, he believed that he had not committed the crime for which he was convicted, namely a battery. A battery requires that the defendant specifically intend to cause injury to the victim. However, Johnny has made clear from the beginning that the shooting was an accident. He only meant to scare Dimas and the gun fired when Dimas jerked his head away. In Johnny's mind, that meant that he did not commit this crime. When the comments at sentencing are juxtaposed against Johnny's other clear confirmation that he was the one solely responsible for the accidental shooting, it is clear that no reasonable juror would discount his testimony.

IV. CONCLUSION

For the reasons stated herein, Christian has established that, in light of the new evidence in conjunction with the record as a whole, it is more likely than not that no reasonable juror would find him guilty of attempt murder with the use of a weapon. This Court should review the merits of Christian's untimely petition.

DATED this 12th day of September, 2014.

Respectfully submitted,

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: /s/ Megan C. Hoffman
MEGAN C. HOFFMAN
Assistant Federal Public Defender

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

⁹ During Luzaich's testimony, this Court asked her whether she knew why Johnny did not testify and if there was "anything that Fadgen did during the course of the trial that would indicate to you that he was not on top of this case or that he would not have had Johnny Walker testify had he had the opportunity to do so." (CR 74 at 123). This Court further asked whether she believed that Fadgen was competent. (*Id.* at 123-24). These questions are not relevant to the *Schlup* analysis. As the Supreme Court made clear in *House*, the only relevant analysis is for this Court to make a holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard. Counsel's competence and the potential reasons why Fadgen did not call Johnny as a witness play no part in that analysis.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on September 12, 2014, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Thom Gover
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Office of the Attorney General
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/s/ Susan Kline
An Employee of the Federal Public Defender,
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHRISTIAN D. WALKER,

Case No. 2:04-cv-0929-KJD-LRL

Petitioner,

v.

**RESPONDENTS' POST-HEARING
 ANSWERING BRIEF (ECF NO. 75)**

JACKIE CRAWFORD, et al.,

Respondents.

I. Limitation of Issues on Remand:

The sole issue before this Court on remand is the credibility of Johnny Walker, Christian Walker's cousin and co-defendant in the attempted murder of David Dimas, to support Christian Walker's ("Walker"), claim of actual innocence as an equitable exception to an untimely filed federal habeas petition.

On August 5, 2005, this Court granted a certificate of appealability as to the following issue: "Whether Petitioner should be granted a full evidentiary hearing in support of his actual innocence claim, therefore demonstrating why he should be granted equitable tolling." ECF No. 31. As a result, the Ninth Circuit, in Case No. 08-15628, considered the issue in a Memorandum Opinion filed on October 29, 2012. ECF No. 41. Therein, the Ninth Circuit found that Walker has conceded that his petition is untimely. The Ninth Circuit considered Walker's claims for equitable tolling based upon "attorney misconduct" and found the claims to lack merit. Walker's claim that his attorney on direct appeal failed to notify him that the Nevada Supreme Court had affirmed

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his conviction was considered and rejected by the Ninth Circuit. Memorandum, ECF No. 41, p.2. Also, Walker's claim that his post-conviction counsel committed misconduct due to a conflict of interest was considered and rejected by the Ninth Circuit. Memorandum, ECF No. 41, pp. 2-3.

As to Walker's claim of "actual innocence" as an equitable exception to the statute of limitations, the sole proffer of evidence acknowledged by the Ninth Circuit was the affidavit of Walker's cousin, and co-defendant, Johnny Walker, asserting that Johnny Walker sent Walker's attorney a letter before he and Walker were tried wherein he claimed sole responsibility for the shooting of David Dimas. The Ninth Circuit was critical of this Court's determination that the evidence supporting Walker's claim of actual innocence was not trustworthy without reviewing Walker's trial record and without "assessing Johnny Walker's credibility at an evidentiary hearing." Memorandum, ECF No. 41, p. 4. As a result, the Ninth Circuit concluded it was "inappropriate for a court on collateral review to decide the contested issue of Johnny Walker's credibility 'based on affidavits alone.'" Memorandum, ECF No. 41, p. 6. As a result an evidentiary hearing was ordered for the sole purpose: "to determine whether Johnny Walker's newly presented testimony makes it more likely than not that no reasonable juror would convict Walker." Memorandum, ECF No. 41, p. 6.

The Court now has a full copy of the trial transcripts and an evidentiary hearing was held on July 9, 2014 for the Court to assess Johnny Walker's credibility.

II. Evidence before the Court:

Based upon the supplementation of the state court record and the testimony provided at the evidentiary hearing the following evidence is before the Court for consideration:

A. The State Court Record, including Reporter's Transcripts of Christian Walker's Trial Proceedings from November 2, 1998 through November 5, 1998. (Stipulated Hearing Exhibits, CR 73, 18-21)

The inclusion of the trial transcripts remedies the Ninth Circuit's first criticism of this Court's initial order rejecting Christian Walker's claim of actual innocence. Sufficient evidence was presented to support Walker's conviction for attempt murder with use of a deadly weapon which certainly undermines his gateway claim of actual innocence.

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1 On September 22, 1997, Christian Walker, his victim, David Dimas ("Dimas"), and a
2 number of friends and acquaintances, Lionel Hernandez ("Lionel"), Mysty Fuller ("Mysty") and
3 Maureen McConahan ("Maureen"), got together at Ullham Elementary School to smoke
4 marijuana after school; around 3:00 to 3:30 p.m. While they were smoking the "blunt,"
5 marijuana rolled into a cigar, someone commented on the gold chain worn by Walker, and
6 Walker took the gold chain off and allowed the group to handle and observe the chain. After
7 about a half hour Walker left the school with Maureen and Mysty, Lionel went home and Dimas
8 returned to his own house. Trial Transcript, Exhibit 58, pp. 37-46, ECF No. 58-27, Stipulated
9 Hearing Exhibit, pp. 325-334 (testimony of David Dimas), Exhibit 59, pp. 17-24, ECF No. 59-1,
10 Stipulated Hearing Exhibit, pp. 460-467 (testimony of Lionel Hernandez), Exhibit 59, pp. 69-76,
11 ECF No. 59-1, Stipulated Hearing Exhibit, pp. 512-519 (testimony of Mysty Fuller).

12 Apparently, Walker misplaced his gold chain. About a half hour after the group departed,
13 Walker went to Dimas' house looking for his gold chain. Dimas denied having the chain. Dimas
14 and Walker then went to Lionel's house to inquire about the chain. The group, Dimas, Lionel,
15 and Walker, looked for the chain at Dima's house, at Lionel's house and at the school to no
16 avail. Walker became angry that he could not find his chain and left telling Dimas, "I ain't going
17 out like no punk," sometime between 5 p.m. and 7 p.m. Trial Transcript, Exhibit 58, pp. 46-50,
18 ECF No. 58-27, Stipulated Hearing Exhibit, pp. 334-338 (testimony of David Dimas), Exhibit 59,
19 pp. 24-25, ECF No. 59-1, Stipulated Hearing Exhibit, pp. 467-468 (testimony of Lionel
20 Hernandez).

21 Later in the evening, Walker returned to Dimas' house with his mother to inquire about
22 the chain. They discussed the whereabouts of the chain for 5 to 10 minutes and Walker's
23 mother threatened to take Dimas to court over the matter. Trial Transcript, Exhibit 58, pp. 50-52,
24 ECF No. 58-27, Stipulated Hearing Exhibit, pp. 338-340 (testimony of David Dimas) see also
25 Trial Transcript, Exhibit 59, pp. 25-26, ECF No. 59-1, Stipulated Hearing Exhibit, pp. 468-469
26 (Walker and his mother also visit Lionel's house looking for the chain).

27 At 7:39 p.m., Walker called the Las Vegas Metropolitan Police Department, non-
28 emergency number, requesting police assistance to retrieve his necklace. An officer was

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1 dispatched and arrived at the scene at 7:53 p.m. The officer “cleared the call” at 8:05 p.m.
 2 indicating “the situation was under control.” But no chain was recovered. Trial Transcript,
 3 Exhibit 59, pp. 4-15, ECF No. 59-1, Stipulated Hearing Exhibit, pp. 447-458.

4 Dimas and another friend Brandon Douzat (“Douzat”), stayed up until 11:00 p.m. at
 5 Dimas’ house playing Nintendo. At about 11:00 p.m., Dimas stepped out of his house with
 6 Douzat to smoke a cigarette before Dimas went to bed. As Dimas and Douzat stood outside
 7 Dima’s house, Walker was observed walking up the street with another person that Dimas and
 8 Douzat did not recognize. Dimas was concerned that he was going to have to fight “Chris”
 9 because Walker still thought that Dimas had his gold chain. Walker approached Dimas and
 10 Douzat at the porch of the Dima’s house and introduced his cousin, Johnny Walker, to Dimas
 11 and Douzat simply as, “this is my homey.”¹ Dimas and Douzat had never previously seen or met
 12 Johnny Walker. Trial Transcript, Exhibit 58, pp. 52-59, ECF No. 58-27, Stipulated Hearing
 13 Exhibit, pp. 340-347 (testimony of David Dimas), Exhibit 59, pp. 86-93, ECF No. 59-1, Stipulated
 14 Hearing Exhibit, pp. 529-536 (testimony of Brandon Douzat).

15 Walker and/or his cousin Johnny Walker invited Dimas and Douzat to smoke some weed.
 16 Walker and/or his cousin Johnny Walker refused Dimas’ invitation to smoke on the porch of his
 17 home and suggested the group go across the street to the dark school to smoke. As the group
 18 walked to the school, Walker reassured Dimas about the gold chain that it’s “cool” and “I don’t
 19 think you’ve got it.” Trial Transcript, Exhibit 58, pp. 57-58, ECF No. 58-27, Stipulated Hearing
 20 Exhibit, pp. 345-346 (testimony of David Dimas), Trial Transcript, Exhibit 59, pp. 91-92, ECF No.
 21 59-1, Stipulate Hearing Exhibit, pp. 534-535 (testimony of Brandon Douzat).

22 When the group was done smoking and getting ready to part ways, Dimas shook
 23 Douzat’s hand and then proceeded to shake Johnny Walker’s hand. Johnny Walker grabbed
 24 Dimas with his left hand produced a small black revolver and shot Dimas in the neck. Dimas
 25 broke loose from Johnny Walker and ran away toward his house. As Dimas ran toward his
 26 house he was shot at two more times. Trial Transcript, Exhibit 58, pp. 59-67, ECF No. 58-27,
 27

28 ¹ The imprecision in Walker’s introduction of his cousin, by concealing his counsin’s name from Walker’s would
 be victims, could certainly have been viewed by a reasonable juror as evidence of Christian Walker’s conspiratorial
 intent.

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1 Stipulated Hearing Exhibit, pp. 347-355 (testimony of David Dimas), Trial Transcript, Exhibit 59,
 2 pp. 93-95, ECF No. 59-1, Stipulated Hearing Exhibit, pp. 536-538 (testimony of Brandon
 3 Douzat).

4 Dimas survived his injury, being a single gunshot wound to the neck. Trial Transcript,
 5 Exhibit 59, pp. 52-57, ECF No. 59-1, Stipulated Hearing Exhibit, pp. 495-500.

6 Toward the end of the month, or the beginning of October 1997, Walker was observed by
 7 a friend, Josh Martinez ("Josh"), arguing with his mother about "turning himself in." Josh and
 8 Christian were at Christian's house "kicking it." Josh was drinking a "40" of malt liquor and
 9 Christian Walker was smoking weed. Christian told Josh about some "court stuff" and that
 10 someone tried to rob him for his necklace and that Christian shot the guy in the neck. Josh
 11 overheard Christian tell his Mom how he shot the guy in the neck and that Christian's mother
 12 told him to turn himself in. Christian Walker later told Josh Martinez not to say anything about
 13 the incident. A couple of days after "kicking it" at Christian's house, Josh held a gun from
 14 Christian Walker for a couple days. When Christian came back to retrieve the gun, he came
 15 with his cousin Johnny Walker and picked up the gun. Trial Transcript, Exhibit 62, pp. 15-18,
 16 ECF No. 59-4, Stipulated Hearing Exhibit, pp. 618-632.²

17 **B. Prior Inconsistent Statements of Johnny Walker's culpability.**

18 A number of prior inconsistent statements by Johnny Walker address the Ninth Circuit's
 19 second concern regarding determining the credibility of Johnny Walker's proffered statement
 20 that he is solely responsible for the attempt murder of David Dimas.

21
 22
 23
 24 ² Christian Walker wants this Court to dismiss Josh Martinez's trial testimony "out of hand" as unreliable because
 25 it was not admitted in the trial against Johnny Walker. Christian Walker ignores the fact that the State's theory
 26 whether in Christian's case or Johnny's case, was that Johnny shot Dimas. While the state's position would be that
 27 Christian's statement to Dima's would be unreliable in Johnny's case to support Johnny's defense to attempt to
 28 blame Christian for the shooting of Dimas, there is nothing inconsistent, or prohibiting the State, from introducing
 Christian's statements to Josh Martinez in a trial against Christian for the purpose of establishing that Christian
 ratified, or adopted as his own, the shooting of David Dimas to reflect positively in the eyes of his friend. That is
 precisely the argument the state made during closing: "He was so mad that days later he was telling Josh Martinez
 about his necklace getting jacked. He was so mad he's still talking about it days later. Days after David got shot.
 Now, he tells Josh that he shot David. Do I think he shot David? Of course not. Nobody thinks Chris shot David.
 But it goes to show that he makes stuff up. He's such a big man, he didn't have the nerve to do it himself, but he can
 tell somebody else that he did it himself." Trial Transcript, Exhibit 62, p. 121, ECF No. 59-4, Stipulated Hearing
 Index, p. 732.

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1. Johnny Hughes Walker Presentence Report (Stipulated Hearing Exhibit No. 32).

As noted by the Ninth Circuit, Johnny Walker and Christian Walker had separate trials on the charges for the attempt murder of David Dimas. Johnny Walker's trial was first. He was ultimately sentenced on October 20, 1998; only a couple of weeks prior to Christian Walker's trial date on November 2, 1998. In the Presentence Investigation Report ("P.S.I."), prepared for the sentencing, Johnny Walker took advantage of the opportunity to provide a written statement about his situation and why he might be suitable for probation that would be considered by the Judge. Johnny Walker's statement was:

I NEVER committed this crime. That'z [sic] why I took it to trial. But the jury had the power on finding me guilty anyway'z [sic]. All I can do is do my time & get out soon (hopefully). One way 2 [sic] look at it at least I wasn't found guilty on the att. murder."

Defendant's Statement, Stipulated Hearing Exhibit No. 32. (Emphasis in original).

Johnny Walker was given an opportunity to explain this statement at the evidentiary hearing on cross examination. Hearing Transcript, ECF No. 74, pp. 73-75. Johnny Walker failed to reconcile how he was adamant in his written statement, prior to his sentencing, that he never committed this crime, being the battery with use of a deadly weapon against David Dimas, but now wants this Court to believe that he could have persuasively testified at his cousin's trial, two weeks later, that he, Johnny Walker, was solely responsible for the shooting of David Dimas. To the extent that he may attempt to assert that the shooting was accidental, and that is what he meant by his statement, his statement to the sentencing court fails to say anything about an accidental shooting.³ To the extent his current counsel may assert that Johnny Walker was

³ Walker's current assertion, made in his post-hearing brief, that Battery is a "specific intent" crime is a misstatement of Nevada Law. NRS 200.481(1)(a) defines battery as: "...any willful and unlawful use of force or violence upon the person of another." Even under Johnny Walker's version of events, when David Dimas reached out his hand, to shake hands with Johnny Walker, Johnny "clamped onto it" and pulled the gun out to scare him, Hearing Transcript, ECF No. 74, pp. 15-16. Such conduct is the willful and unlawful use of force or violence. Johnny Walker had no legal right to use physical force, brandish a firearm and require Dimas to provide information about a necklace. Even assuming the "tensing up" of the trigger finger as accidental, the battery had already been accomplished. Of course the evidence at trial was that two more shots were fired as Dimas ran away. Given the state of the law, it is not realistic to read the record of Johnny's sentencing and his assertion that "I did not commit this crime" to mean: I did not commit a battery, but I committed an assault, or the offense of brandishing a firearm, or the offense of being a prohibited person in possession of a firearm, or any number of alternative offenses. Given the

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1 simply exercising his right to due process and obtain as favorable of a result at sentencing as
 2 possible, such an explanation would not have mitigated the impeachment effect of Johnny's
 3 statement had he attempted to testify at Christian Walker's trial that he was solely responsible
 4 for the shooting of David Dimas.

5 At the evidentiary hearing, Deputy District Attorney Luziach confirmed her representation
 6 of the State at Johnny Walker's trial and sentencing for the shooting of David Dimas and that
 7 she read Johnny's statement prior to sentencing and was present at sentencing when "he still
 8 continued to deny any responsibility in the act." Hearing Transcript, ECF NO. 74, pp. 110-111.
 9 Luziach's view of Johnny's defense theory of his case was "...either Johnny wasn't there, or if
 10 you believed Johnny was there, that either Chris did it or some other random person just
 11 happened to do it ... Johnny did not do it." Id. at pp. 108-109. DDA Luziach confirmed her
 12 recollection of Johnny Walker's defense counsel claiming that Johnny Walker would testify on
 13 Christian Walker's behalf as a basis for a severance motion. Id. at pp. 105-106. As a result,
 14 Luziach was prepared to cross-examine Johnny Walker, and had no shortage of impeachment
 15 evidence, if Johnny Walker had testified in Christian's case:

16 "...the denial of Johnny of any responsibility whatsoever in the PSI
 17 where he wrote in capital letters: 'I did not commit the crime.' That's
 18 why he went to trial. And then at the sentencing hearing when Judge
 19 McGrorty [sic] asked him the question, something about you've told
 20 me that you didn't commit this crime, and twice he said, during the
 sentencing hearing, 'No, I didn't commit this crime. That's why I went
 to trial for it.' So, his complete denial of it would, in my opinion,
 impeach him for anything that he said accepting responsibility in
 Chris' trial."

21 "He had a prior conviction for attempt burglary. That would be
 22 admissible for credibility purposes. If Johnny were to take the stand,
 23 I would have attempted to impeach the relationship. I would have
 expected Johnny to deny the relationship, the close – close
 relationship between Johnny and Chris."

24 Id. at pp. 114-115.⁴ Quite frankly, DDA Luziach was ready to destroy Johnny Walker's credibility
 25 and defense Counsel Fadgen apparently could see it coming and decided not to call Johnny

26 record of his trial and a reasoned reading of the record, Johnny Walker only meant he did not shoot David Dimas,
 27 someone else must have.

28 ⁴ DDA Luziach's speculation about Johnny trying to deny the close relationship between him and his cousin was
 borne out in the instant evidentiary hearing wherein he attempts to minimize the relationship. The characterization of
 the minimal relationship does not stand up to cross-examination in light of their relationship as cousins growing up,
 and later as young adults, socializing at parties, using controlled substances together and committing crimes

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Walker to the stand even though he had properly noticed Johnny as a witness and had arranged for his availability.

2. Reporter's Transcript of Johnny Hughes Walker Sentencing – October 20, 1998 (Stipulated Hearing Exhibit No. 15).

During sentencing, Johnny Walker confirmed in open court his position that he did not commit the crime of battery with use of a deadly weapon against David Dimas and that's why he took the case to trial. Reporter's Transcript, ECF No. 73, Stipulated Hearing Exhibit, No. 15 p. 282, p. 9, ll. 4-7. Johnny Walker was adamant in his denial of any culpability and actually challenged the trial court judge's recitation of the facts of the case in the following exchange:

The Court: Please Stand, Mr. Walker. As you know, sir, I have presided over your trial and I have also read every word in this P.S.I. a couple times.

It's clear to say that you come from a dysfunctional family as this report says is an understatement, but what you have done in the past as your attorney has indicated is an explanation perhaps for what you did and why you are standing there today.

The Defendant: I didn't commit this crime, though.

Id. at p. 15, ll. 1-13.

Johnny Walker was given an opportunity to explain this statement at the evidentiary hearing on cross examination. Hearing Transcript, ECF No. 74, pp. 75-80. Johnny Walker failed to reconcile how he failed to explain to the sentencing court, what he now asserts to be the accidental nature of the shooting of David Dimas, and instead, continued adamantly to assert that he didn't commit the crime. His weak explanation at the evidentiary hearing was that he was essentially young and "a knucklehead." Id. at p. 80. As discussed above, DDA Luziach would have used Johnny Walker's continued denials of culpability to impeach him if he attempted to testify on Christian Walker's behalf.

together. Christian's characterization of his relationship with his cousin is probably the most accurate: "My cousin & I are way tighter than that."

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3. **Reporter's Transcript of Trial Proceedings verses Johnny Walker (Stipulated Hearing Exhibit Nos. 10-13).**

The transcript of Johnny Walker's trial shows his defense theory was not merely to contest the State's case against him, but to actually point the finger at Christian Walker and argue his complete lack of any culpability. Johnny Walker attempted to present as evidence the confession of Christian Walker, through the testimony of Josh Martinez that Christian Walker had admitted to shooting David Dimas in the neck. Reporter's Transcript, ECF NO. 73, Stipulated Hearing Exhibit No. 12, pp. 222-229, pp. 32-59. In arguing for the admission of Josh Martinez' testimony that Christian Walker admitted to shooting someone in the neck over a lost necklace, Johnny Walker's counsel argued:

"During the course of this trial, the State has put on witness after witness...which put Chris Walker in that park, which gave Chris Walker a motive to shot [sic] someone in the neck, which gave Chris Walker all the corroborating evidence necessary for this court to allow in a confession by Chris Walker which would in fact tend to exculpate our client..."

Id. at p. 224, p. 38.

During his opening statement, Johnny Walker again pointed the finger at Christian Walker: "But from the evidence, Chris Walker, the friend could have pulled the trigger." Id. at p. 252, p.152, ll. 21-22.

At closing, counsel for Johnny Walker continued to argue that Christian Walker had planned to meet David Dimas for "some show down about a necklace," Reporter's Transcript, ECF No. 73, Stipulated Hearing Exhibit No. 13, p. 269, pp.49-50. Counsel notes: "Chris had already come back twice that day. He said, I ain't going out like no punk. So he's mad, so they plan this meeting...Chris Walker is there, and he wants his chain back." Id. at p. 273, p. 68, ll. 14-17, 24-25. In continuing to point the finger at Chris Walker, Counsel argues: "The prosecution spends the entire case building a motive for Chris Walker to come get his chain back;" Id. at p. 274, p. 69, ll. 1-2; "Who has the motive to shoot? Chris." Id. at p. 70, ll. 13-14; "They presented a beautiful case against Chris Walker." Id. at p. 71, ll. 7-10.

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DDA Luziach prosecuted Johnny Walker and was aware of the case that was presented in his defense, that Christian was the one who committed the crime, and was therefore certainly ready to impeach Johnny Walker had he testified in Christian Walker's case as more thoroughly discussed above.

C. Christian Walker's statement about his relationship with Johnny Walker. (Stipulated Hearing Exhibit No. 30).

Christian Walker wrote a letter to his girlfriend on October 7, 1998, after Johnny Walker's trial was completed but prior to Christian Walker's trial. Therein Christian Walker provides some insight into the relationship between the two cousins:

I want to see what was all said at my cousin's trial. You know he got 2-20 years right? I hope he beats it on an appeal. I would hate to see him do all that time. Did you write him yet?" These fagit-ass police told they heard he was snitchin on me... I told them 'shut that lying shit up? You didn't hear that fuckin shit? Don't even come at me like that!!!' These fuckin police up here are 'haters from hell!' My cousin & I are way tighter than that.

At the evidentiary hearing Johnny was given an opportunity to deny Christian's characterization of their relationship and he did not. Hearing Transcript, ECF No. 74, pp. 32-33.

D. Johnny Walker's Evidentiary Hearing Testimony was incredible and demonstrated bias. This is not "reliable" evidence as required by *Schlup*.

Johnny couldn't even tell us where he lived in September/October of 1997. Either he lied to the Las Vegas Justice Court in filing out his intake services information sheet about living with someone named Tasha on 2101 Sandy Lane, Stipulated Hearing Exhibit No. 1, or he is lying to the Court about living in an apartment across the street from his cousin. Hearing Transcript, ECF No. 74, pp. 22-25.

Johnny's attempted to hedge and assert that he and Christian were not that close; that they only were together "once in a while" also came across as disingenuous. Hearing Transcript, ECF No. 74, p. 26. Under cross he had to acknowledge going to parties together, smoking marijuana together and the evidence is that they committed crimes together; including the murder of Maureen McConahan. Christian's description of them as being "tight" in his jailhouse letter to his girlfriend also belies Johnny's minimization of their mutual relationship. Hearing

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Transcript, pp. 32-33; Stipulated Hearing Exhibit No. 30, p. 830. Additionally, they were cellies together in Ely State Prison (“ESP”) for a month, but want us to believe that they never got together to get their story straight on Christian’s post-conviction petition. Hearing Transcript, p. 34; see also p. 99 (Inmate Ken Lake’s description of Johnny, Christian and Lake all housed together in Unit 8 during the time Lake prepared Johnny’s September 2002 affidavit).

Johnny’s testimony about his ESP affidavit further revealed his lack of credibility. On the face of his signed and attested affidavit he states: “I contacted via letter, Mr. Fadgen, Christian Walker’s attorney, at 616 S. Third Street, Las Vegas....” Stipulated Hearing Exhibit No. 34. As a result of this statement, this Court has granted discovery requests to search the district attorney’s office’s files for this letter and counsel for Christian Walker has represented their efforts to locate the letter in Mr. Fadgen’s files and/or the files of attorneys that may have taken over Mr. Fadgen’s cases. And, of course, the letter has never been found because at the evidentiary hearing, it is discovered that Johnny did not “contact via letter, Mr. Fadgen,” but he now asserts he only wrote a letter and handed it to “Chris to give to his attorney.” Hearing Transcript, ECF No. 74, pp. 18-19, 56. At least, he now acknowledges that he does not know if Christian gave the letter to Fadgen. Hearing Transcript, ECF No. 74, p. 19. There is no evidence of what Christian did with the purported letter.⁵ Respondents acknowledge that the assertion got to defense counsel in one form or another, as Fadgen swore “upon information and belief” that Johnny would testify on Christian’s behalf in support of a motion to sever. Nevertheless, again we have an inconsistency that affects Johnny’s credibility.

As discussed above, Johnny could not reconcile his prior inconsistent statements but attempted to restore his credibility with a purported prior consistent statement. At the evidentiary hearing, the testimony of his Uncle, Gerald D. Walker, Christian’s father, unbelievably asserted that prior to Johnny Walker’s arrest, in October of 1997, Johnny informed him of his sole

⁵ Christian did submit his affidavit in support of his instant petition that he saw the affidavit in his attorney’s possession. Curiously, Christian does not state in his affidavit that he knows Johnny’s jailhouse letter was in his attorney’s possession because he, himself, provided it to his counsel. Instead, Christian asserts that he had merely “...seen the letter ... in John Fadgen’s possession, and had also discussed the letter with John Fadgen concerning his intentions for the letter at trial.” See Amended Petition, p. 66, ECF No. 8. ¶ 10 (Affidavit of Christian Doran Walker in Support of Petition for Writ of Habeas Corpus (Post-Conviction)).

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responsibility for the shooting of David Dimas. Gerald D. Walker's testimony is so unbelievable because he wants the Court to believe, that prior to his testimony at the July 9, 2014, evidentiary hearing, or at some time prior, when he was preparing for the hearing with representatives from the Federal Public Defender's Office, he never told anyone about the admission of Johnny Walker that would have potentially exculpated his son. Hearing Transcript, ECF No. 74, p. 143. Gerald Walker wants the Court to believe that he watched his son go to trial and get convicted of a crime and he waited until the next century to come forward with exculpatory evidence. The assertion is not credible in light of the evidence of the motive of Christian Walker presented at his trial.

Johnny could not adequately explain how a simple stroll in response to the page of a young lady friend to Christian, turned from hopes of hanging out and maybe getting lucky with two young ladies, to a coincidental meeting with David Dimas, outside his house, at exactly the same time that Dimas had stepped outside of his house for a smoke, and Johnny coincidentally had some weed and a firearm in his pocket in order to facilitate his on the fly plan, all by himself, to lure Dimas across the street and shoot him. Hearing Transcript, ECF No. 74, pp. 59-69. Johnny Walker could only assert that Respondents' counsel was trying to trick him on the stand, but the questioning was clear enough. The state's theory of the case as articulated by DDA Luziach at the evidentiary hearing, and as argued at Christian Walker's trial, is much more credible, and supported by the evidence, then the coincidental encounter described by Johnny Walker:

That Chris believed that David Dimas stole his necklace, and he was very angry as evidenced by the fact that he made numerous efforts to go [to] David's house and get his necklace back. He was not able to get his necklace back. David said he didn't have it. Chris was angry. That Chris and Johnny went to David's house, lured him essentially away from his house, and that on Chris' behalf, at Chris' behest, Johnny shot David.

Hearing Transcript, ECF No. 74, pp. 107-108. Johnny's own trial counsel apparently agreed and commented during closing argument in Johnny's trial, as discussed above, on the motive of Christian Walker and the "beautiful case against Chris Walker" presented by the State.

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III. Analysis:

The sole issue before this Court on remand is the credibility of Johnny Walker, Christian Walker's cousin and co-defendant, in the attempt murder of David Dimas, to support Christian Walker's claim of actual innocence as an equitable exception to an untimely filed federal habeas petition.

A. The "demanding and seldom met" standard of actual innocence.

The Supreme Court of the United States has recently held that actual innocence, if proved, serves as a gateway through which a federal habeas petitioner may pass to excuse the expiration of the AEDPA statute of limitations. *McQuiggin v. Perkins*, 113 S.Ct 1924, 1928 (2013)⁶. The Court "cautioned" that "tenable actual-innocence gateway pleas are rare: 'A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 329 (1995) and *House v. Bell*, 547 U.S. 518, 538 (2006) and emphasizing that the standard is "demanding" and seldom met).

In making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of the evidence" purporting to show actual innocence." *Id.* *McQuiggin* clarified that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part as a factor in determining whether actual innocence has been reliably shown and could hold the unjustified delay against the petitioner when making credibility findings as to whether the exception has been met. *Id.*

McQuiggin involved a federal habeas petition filed more than 11 years after the petitioner's conviction became final. As in Christian Walker's case, the petitioner in *McQuiggin* also asserted he had newly discovered evidence of actual innocence in the form of an affidavit identifying a third party and exculpating the petitioner. The latest affidavit was dated nearly five years prior to the time when the petitioner finally filed his petition. As a result, the petition, was untimely filed having been filed after one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due

⁶ In *McQuiggin* the Supreme Court of the United States continues to acknowledge that it "has not resolved whether a prisoner may be entitled to habeas relief based on a freestanding actual-innocence claim. *Id.*

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diligence.” See *McQuiggin*, 113 S. Ct. at pp. 1929-30. Because of the lack of diligence on the part of the petitioner, equitable tolling, as in *Holland v. Florida*, 130 S.Ct. 2549 (2010), could not apply. *Id.* at 1931. As a result, the *McQuiggin* Court found an equitable exception for late-filed actual-innocence gateway claims to override the statute of limitations. *Id.*

In *McQuiggin*, the Supreme Court of the United States overturned the Sixth Circuit’s reversal of a District Court order dismissing a gateway claim of actual innocence. *Id.* at 1936. The Supreme Court of the United States found that the District Court had proceeded properly in first determining that the petitioner’s claim was filed beyond AEDPA’s limitations period and that equitable tolling was unavailable to the petitioner due to a lack of “exceptional circumstances [or] diligence.” *Id.* at 1936. The Supreme Court of the United States additionally found, that the District Court’s appraisal of the inmate’s petition: (1) that the alleged newly discovered evidence was “substantially available” to the petitioner at trial and (2) that the proffered evidence was hardly adequate to show that, had it been presented at trial, no reasonable juror would have convicted the petitioner; should be dispositive of the insufficiency of the petitioner’s claim of actual innocence. See *Id.* As such, *McQuiggin*, is a good example of a petitioner failing to meet the “demanding and seldom met” standard of proof of a gateway claim of actual innocence.

B. Walker’s Evidence is not new.

To characterize Johnny Walker’s claim of sole culpability for the attempt murder of David Dimas as “new evidence” is to foster abuse by defendants who may withhold the use of evidence during trial because of the knowledge that they may get a second chance at a trial because of the “new evidence,” that was always available to them, but simply was not initially presented at the first trial.

It is problematic to characterize Johnny Walker’s claim of sole culpability for the attempt murder of David Dimas as “new evidence.”

In the affidavit of Christian Walker in support of his instant petition for writ of habeas corpus, Christian Walker acknowledges he has known of Johnny Walker’s claim of sole culpability from before the time he was tried in November of 1998:

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9. That your affiant and others were aware before trial that the co-defendant in the case, my cousin Johnny Walker, had mailed a signed letter to John Fadgen where he confessed to the crime, offered to testify on my behalf, and admitted that I was not involved in any of his planning, and had not in any way aided him in the crime he committed.

10. That well before trial in this case, your affiant had seen the letter referred to in Paragraph 9 in John Fadgen's possession, and had also discussed the letter with John Fadgen concerning his intentions for the letter at trial.

Amended Petition, ECF No. 8, p. 66 (Affidavit of Christian Doran Walker in Support of Petition in Support of Petition for Writ of Habeas Corpus (Post-Conviction)). It should have been obvious to Christian Walker that neither the claimed letter, nor his cousin, were utilized during his trial that ended on November 5, 1998.⁷ Nevertheless, Christian Walker does not file any claim based on the asserted factual predicate, that Johnny committed the crime, in the Nevada State Courts until July 14, 2003. Joint Stipulation, No. 4, ECF No. 65. And, Christian Walker does not raise his claim of actual innocence in the instant federal proceeding until July 2, 2004. Joint Stipulation, No. 7, ECF No. 65. As instructed in *McQuiggin* this delay in asserting the actual innocence claim should negatively impact this Court's evaluation of the credibility of the claim.

The Ninth Circuit panel, citing *Griffin v. Johnson*, 350 F.3d 956, 961-63 (9th Cir. 2003), found that the evidence of Johnny Walker's claim of sole culpability, in the form of his affidavit, is "newly presented" evidence for purposes of *Schlup* even though it may have been available at the time of Walker's trial. Memorandum, ECF No. 41, pp. 2-3. *Griffin* is the current state of the law in the Circuit and specifically resolved the question whether evidence must be "newly discovered" or merely "newly presented" to support a gateway claim of actual innocence in the Circuit.

The Ninth Circuit position is at odds with the recent *McQuiggin* opinion from the Supreme Court of the United States. In *McQuiggin*, the Supreme Court of the United States found the following findings of the district court to be dispositive on the petitioner's failure to establish his claim of actual innocence: (1) that the alleged "newly discovered evidence" was substantially available at trial and (2) that the proffered evidence, "even if 'new,'" was hardly adequate to

⁷ Christian Walker also acknowledges this point in his Affidavit at paragraph 11. Amended Petition, p. 66, ECF No. 8.

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show that, had it been presented at trial, no reasonable juror would have convicted the petitioner. *McQuiggin*, 133 S.Ct at 1936. Requiring a petitioner to come forward with “newly discovered” evidence, verses merely “newly presented” evidence, is more consistent with the Court’s characterization of the *Schlup* standard as being “demanding and seldom met.” The “newly presented” evidence view fosters abuse and a lack of finality in criminal proceedings. As in the instant case, if Christian Walker felt maybe there was a chance that he could gain an acquittal in his case without requiring his cousin to incriminate himself,⁸ than why not try and obtain that favorable result without the use of the evidence of his cousin’s confession and then try again with the confession if things do not work out. As discussed by the Supreme Court in *McQuiggin*, the equitable exception of actual innocence is only meant to “...seek to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.” *Id.* at 1932. The strategic withholding of evidence is not “the extraordinary case” that should be granted a second opportunity to raise stale claims.

C. Even if considered “new evidence” for *Schlup* purposes, the delay in asserting the claim of actual innocence, from before Christian Walker’s trial even started to July 14, 2003, close to five years, renders Christian Walker’s claim of actual innocence incredible.

Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *McQuiggin*, 133 S.Ct. 1935. The Supreme Court specifically considered the hypothetical that a prisoner might “lie in wait and use stale evidence to collaterally attack his conviction when an elderly witness has died and cannot appear at a hearing to rebut new evidence” and concluded: “The timing of such a petition, however, should seriously undermine the credibility of the actual-innocence claim.” *Id.* at 1936.

The timing of Walker’s claim of actual innocence is highly suspect and he has no credibility. According to his own admissions, he has always known his cousin would testify

⁸ After all, the State’s evidence was that Johnny Walker was the triggerman and Johnny Walker already had a pretty favorable result at his trial; acquitted of attempt murder with use of a deadly weapon, but convicted of the less serious offense of battery with use of a deadly weapon.

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favorably for him. Yet, the evidence was not presented at trial.⁹ There is no evidence that any letter of confession ever existed except via the word of two convicted, blood-related, co-conspirators, and felons. And, the claim is only made after Walker becomes aware of the death of his trial counsel. While not completely dispositive of the issue, this Court should make credibility determinations regarding the testimony provided by Johnny Walker with the timing to the actual innocence claim being a big factor.

D. “Moreover, the proffered evidence, even if ‘new,’ is hardly adequate to show that, had it been presented at trial, no reasonable juror would have convicted [Christian Walker].” – McQuiggin.

While the above analysis of the meaning of “new evidence” in the circuit, in light of recent Supreme Court authority, raises questions about Circuit precedent, the record facts simply reveal that Christian Walker’s claim of actual innocence has no merit. *Schlup* offered three examples of evidence that would pass the threshold of reliability: exculpatory scientific evidence, trustworthy eyewitness accounts and critical physical evidence. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). This Circuit has viewed the Supreme Court’s offering of examples of evidence as “telling us that less reliable kinds of evidence cannot support an actual innocence claim” and that “the Court clearly did not hold that *Schlup* may be invoked whenever a witness changes his story.” *Carriger v. Stewart*, 132 F.3d 463, 483 (9th Cir. 1997).

Johnny Walker does not present a trustworthy eyewitness account of the shooting of David Dimas.¹⁰ There is no letter. Johnny Walker’s affidavit, we now know, falsely references a letter that he sent to trial counsel, John Fadgen, claiming sole culpability for the attempted murder of David Dimas. Christian Walker claims in his affidavit that he saw the letter in John Fadgen’s possession. A curious assertion as Johnny Walker testified that he handed the letter to Christian. Yet, this Court has granted Walker discovery for the specific purpose of locating this letter. The “letter,” of course, has not turned up. John Fadgen, due to Walker’s delay, is not available to confirm or deny the existence of the “letter.” There was never any reason for John Fadgen to dispose of the letter as there was nothing to hide. If the letter existed, it was

⁹ The evidence was not presented because it had no evidentiary value and was easily impeachable.

¹⁰ Of course, Christian Walker’s actual innocence claim does not present any exculpatory scientific evidence or critical physical evidence either.

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unreliable, easily impeached, and not of any scandalous import that John Fadgen would have a motive to dispose of the "letter" to avoid a claim of ineffective assistance of counsel but the letter is a red-herring. Even if it did exist, it does nothing to establish Christian Walker's actual innocence.

Sometime during Walker's trial, November 2, 1998 through November 5, 1998, John Fadgen, Christian Walker's trial counsel, could have put Johnny Walker on the stand and Johnny Walker could have said: "I did it all by myself, Christian had no idea what I was going to do." The problem is, just two months earlier, in September 1998, Johnny Walker presented a case in his defense, not only denying his culpability, but also asserting that "Chris Walker ... could have pulled the trigger" and opining that the State presented a "beautiful case against Chris Walker." At sentencing, Johnny Walker denied his culpability, arguing with the Judge: "I didn't commit this crime, though." And, while we do not have any letter written by Johnny Walker to John Fadgen claiming sole culpability for the attempt murder of David Dimas, we do have Johnny Walker's handwritten statement of allocution to Parole and Probation stating:

I NEVER committed this crime. That'z [sic] why I took it to trial. But the jury had the power on finding me guilty anyway'z [sic]. All I can do is do my time & get out soon (hopefully). One way 2 [sic] look at it at least I wasn't found guilty on the att. murder."

And, to make matters worse, every one of these statements made by Johnny Walker were made in the presence of the same prosecutor, Elissa Luzaich that would later prosecute Christian Walker.

Given the emphatic statements denying culpability, it is no wonder, John Fadgen, Walker's trial counsel, who apparently intended on presenting evidence of Johnny Walker's claim of sole culpability,¹¹ quickly changed course and proceeded to represent Walker without the use of such dubious evidence. In the decision to not put Johnny Walker's statement on the record, the presumption of the effective assistance of counsel should certainly apply to trial counsel, John Fadgen. If trial counsel was to put the Johnny Walker statement on the record, he would have to attempt to defuse the impact of certain impeachment by having Johnny Walker

¹¹ Indications are that John Fadgen was certainly prepared to use Johnny Walker as a witness. He was noticed as a witness. Stipulated Hearing Exhibit No. 8.

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attempt to explain his prior inconsistent statements or simply allow Deputy District Attorney Luzaich to impeach Johnny Walker. And, to what end? The jury would be presented with conflicting statements by Johnny Walker and the jury most likely would find Johnny Walker's statements incredible. For the purposes of *Schlup* at least one reasonable juror would find Johnny Walkers' statements suspect and still vote that Christian Walker was guilty of attempt murder.

Johnny Walker's proffered statement of sole culpability, given the easy impeachment of the statement, is not the reliable new evidence that would cause every reasonable juror to acquit Walker. This is not the exceptional case where the courts should be concerned about an innocent man being incarcerated, such that we must ignore statutes of limitations, procedural defaults and finality so that we may remedy a fundamental miscarriage of justice.

IV. Conclusion.

Christian Walker's gateway claim of actual innocence is without merit and should not excuse his untimely filing of his instant federal habeas petition. The new evidence, that his cousin was solely culpable for the attempt murder of David Dimas, was available at the time of trial, but was so unreliable, and so easily impeachable, that trial counsel did not present the evidence. Christian Walker waited until the death of his trial counsel to bring the instant claim of actual innocence and has no reliable evidence to support the claim besides his word and the word of a deeply flawed witness. This Court should make the requisite findings of a lack of credibility of Johnny Walker and his Uncle Gerald Walker as discussed above. The delay in the assertion of the claim should likewise be noted as impacting the credibility of the claim. Christian Walker's Amended Petition, ECF No. 8, should therefore be dismissed as untimely filed, pursuant to 28 U.S.C. §2244(d), as Christian Walker failed to establish any right to an equitable exception to excuse the untimely filing.

DATED this 24th day of October, 2014.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Thom Gover
THOM GOVER
Chief Deputy Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***Respondents' Post-Hearing Answering Brief*** with the Clerk of the Court by using the CM/ECF system on the 24th day of October 2014.

The following participants in this case are registered CM/ECF users and will be served by the CM/ECF system:

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8 Attorneys for Petitioner

9 UNITED STATES DISTRICT COURT
10 DISTRICT OF NEVADA

11 CHRISTIAN WALKER,

12 Petitioner,

13 vs.

14 E.K. MCDANIEL, Warden,

15 Respondents.
16

2:04-cv-00929-KJD-PAL

**PETITIONER'S POST-HEARING
REPLY BRIEF**

17 The Petitioner, Christian Walker, through his attorneys, Megan C. Hoffman and Jonathan M.
18 Kirshbaum, Assistant Federal Defenders, hereby submits his Post-Hearing Reply Brief, pursuant to this
19 Court's order. This response is based on the Points and Authorities below, as well as all pleadings and
20 exhibits already on file in this matter.

21
22 DATED this 10th day of November, 2014.

23 Respectfully submitted,

24 LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER
25

26 By: /s/ Megan C. Hoffman
MEGAN C. HOFFMAN
27 Assistant Federal Public Defender

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
28

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POINTS AND AUTHORITIES

I. INTRODUCTION

In their Post-Hearing Answering Brief, Respondents make three main arguments: (1) the timing of the actual innocence claim was “suspect” (CR 77 at 16-17); (2) Johnny’s 2002 affidavit was not “new” evidence under the Schlup standard (CR 77 at 14-16); and (3) Johnny’s testimony at the hearing was not trustworthy (CR 77 at 17-19).

These arguments have no merit and should be rejected. First, there was nothing untoward with the timing of the actual innocence claim. To the contrary, the timing of the actual innocence claim fully renders it reliable. Christian’s innocence has been an issue since the beginning of the case. The fact that Johnny was willing to offer exculpatory evidence was known before trial. This is not an issue that popped up for the first time years after the trial. It has always been an issue. Further, Christian raised the issue at the first available opportunity, in his state post-conviction petition, and less than a year after obtaining the affidavit from Johnny. Christian then advanced the actual innocence claim in federal court to overcome the time bar almost immediately after the proceedings in state court ended and less than two years after he obtained the affidavit.

Second, under prevailing Ninth Circuit authority and the law of the case doctrine, Respondents cannot reargue the already settled question that Johnny’s affidavit constituted new evidence under the Schlup standard. Their argument that McQuiggins v. Perkins, 133 S. Ct. 1924 (2013), overruled the Ninth Circuit precedent on this issue is based on an unjustified and exceedingly overly broad reading of non-essential language in that decision.

Finally, Respondents have failed to convincingly show why Johnny’s testimony that he acted alone in shooting Dimas was untrustworthy. As discussed in the opening brief, there were numerous reasons to find his version reliable – among other things, it was consistent with the State’s theory at trial, it was consistent with the trial evidence, it was consistent with statements that both his attorney and Christian’s attorney had made before trial, it was consistent with his 2002 affidavit, and it was consistent with a statement he made to his uncle before he was even arrested. Moreover, Johnny’s inconsistent prior statements that he did not commit the crime do not undermine the reliability of his hearing testimony. When both his hearing testimony and the prior statements are looked at in their appropriate

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1 context, the prior statements do nothing to undercut his hearing testimony that he acted alone in shooting
2 Dimas.

3 Accordingly, for the reasons discussed herein and in the Opening Brief, Christian has met the
4 actual innocence standard.

5 **II. ARGUMENT**

6 **A. There Was No Unexplainable Delay in the Presentation of the Actual Innocence**
7 **Evidence; Rather, the Timing Supports the Actual Innocence Claim**

8 Respondents argue that Christian’s “unexplained” delay in asserting his actual innocence claim
9 rendered it incredible. CR 77 at 16. They argue that Christian did not present the actual innocence
10 evidence at trial, there is no evidence that Johnny’s letter existed, and the claim was not made until his
11 trial attorney died. Id. at 17.

12 These arguments are both inconsistent and illogical. There really can be no doubt that there was
13 no “unexplainable delay” in raising the actual innocence claim. In McQuiggin v. Perkins, 133 S. Ct.
14 1924, 1935 (2013), the Supreme Court rejected the State’s argument that a diligence requirement applied
15 to an actual innocence claim to overcome a time barred petition. Rather, the Court concluded that
16 “timing [is] a factor relevant in evaluating the reliability of a petitioner’s proof of innocence.” Id.
17 “Unexplained delay in presenting new evidence bears on the determination whether the petitioner has
18 made the requisite showing.” Id.

19 Here, the timing of the actual innocence claim fully supports Christian’s claim. In the first
20 instance, Christian raised the question of his actual innocence in his motion to sever filed before his trial.
21 Fadgen specifically indicated that Johnny would exculpate Christian. Thus, this has been an issue in the
22 case from the very beginning. Fadgen did not present this evidence at trial. There is no indication in
23 the record why Fadgen did not present it. But it is clear that this was Fadgen’s decision to make. The
24 record clearly shows that Christian wanted this evidence presented. The first opportunity that Christian
25 had to present the actual innocence claim was in a post-conviction petition. Just as important, the new
26 evidence that formed the basis for the actual innocence claim, Johnny’s affidavit, did not even exist until
27 September 2002. Once armed with the affidavit, Christian presented it to the state court less than a year
28 later in his July 2003 state post-conviction petition. See CR 60, Ex. 93. In that petition, he specifically

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1 argued that counsel was ineffective for failing to rely upon Johnny's "confession." CR 60, Ex. 92 at 5.
2 The proceedings on the state petition ended on March 30, 2004. CR 60, Ex. 109. A little over three
3 months later, Christian filed his federal petition in which he also asserted ineffective assistance of
4 counsel based on counsel's failure to use Johnny's confession. CR 5 at 3. Johnny's affidavit was
5 attached to the petition. Id.

6 As can be seen, there was no "unexplainable delay" in presenting either the new evidence or the
7 actual innocence claim. This was an issue that has been present in the case from the very beginning.
8 Christian has consistently argued that the evidence of innocence was not presented at trial due to
9 ineffective assistance of counsel. Just as important, Christian diligently moved on the innocence claim
10 at the first available opportunity that he could raise it in the post-conviction petition. It was filed less
11 than a year after he obtained the affidavit from Johnny. He then filed his federal petition just over three
12 months after the state proceedings ended. Indeed, this is nothing like the situation in McQuiggin
13 whether the petitioner waited six years to seek relief in federal court based on the new evidence.
14 McQuiggin, 133 S. Ct. at 1929-30. Christian took under a year to first present the claims to the state
15 court and under two years to present it to federal court. Rather than render his claim incredible, the
16 timing of the actual innocence claim does the exact opposite. It renders it reliable.¹

17 Respondents' arguments to the contrary are illogical and inconsistent. Respondents argue both
18 that Christian should have presented the evidence at trial and also that Johnny's letter confessing the
19 crime never existed. This is completely inconsistent. If the confession did not exist, how could
20 Christian assert his innocence at trial? Notwithstanding the inconsistency of the arguments, each of the
21 individual arguments are entirely unpersuasive. The post-conviction pleadings make clear that Christian
22 *wanted* this evidence presented to the jury. It was his attorney's decision not to present it. And there
23 is no doubt that his counsel was aware of the favorable testimony that Johnny could offer as Fadgen
24 described it in his affidavit in support of the severance motion. Respondents' final argument that
25 Christian waited to file the claim until his attorney died is patently absurd. As set forth in an affidavit

26
27 ¹ Christian acknowledges that not all of these facts were included in the joint stipulations
28 or the exhibits at the hearing. However, Respondent's are raising this timing argument for the first time
in the Answering Brief. Christian had no notice before the hearing that Respondents would be raising
this novel argument.

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1 from Fadgen's colleague, Christopher Rasmussen, Christian did not even learn that his direct appeal had
 2 been decided until after Fadgen's death. CR 20 at 3. Christian *could not have even presented* the actual
 3 innocence claim until after Fadgen had died. In fact, it was Fadgen himself who interfered with
 4 Christian's ability to raise the actual innocence claim as he misinformed Christian that his direct appeal
 5 was still pending, when it actually was not. Id.

6 In sum, the timing of the actual innocence claim renders it reliable. Respondents' arguments to
 7 the contrary are without merit.

8 **B. Law of the Case Bars Respondents from Relitigating the Issue of Whether Johnny's**
 9 **Affidavit Represented New Evidence under the *Schlup* Standard**

10 Respondents argue that Johnny's claim of sole responsibility does not qualify as "new evidence"
 11 under the Schlup standard because it was not "newly discovered evidence." CR 77 at 14-15.

12 Law of the case bars this argument. In the appeal from this Court's order dismissing the petition,
 13 the Ninth Circuit specifically held, "Johnny Walker's affidavit [claiming sole responsibility for shooting
 14 Dimas] is therefore 'newly presented' evidence for purposes of Schlup even though it may have been
 15 available at the time of Walker's trial." CR 41 at 3-4. The panel relied upon that court's prior decision
 16 in Griffin v. Johnson, 350 F.3d 956, 961-63 (9th Cir. 2003). Id. at 4. Thus, under the law of the case
 17 doctrine, this argument cannot be relitigated here. Merrit v. Mackey, 932 F.2d 1317, 1320 (9th Cir.
 18 1991) (decision of prior panel should be followed unless there is new evidence, intervening authority
 19 has changed the law or prior decision was clearly erroneous and would work manifest injustice).

20 Respondents' attempt to overcome this doctrine has no merit. Respondents argue that Griffin
 21 is "at odds" with the Supreme Court's decision in McQuiggin. CR 77 at 15. According to Respondents,
 22 the Supreme Court indicated in McQuiggin that "the following findings of the district court to be
 23 dispositive on the petitioner's failure to establish his claim of actual innocence: (1) that the alleged
 24 'newly discovered evidence' was substantially available at trial and (2) that the proffered evidence, 'even
 25 if "new," was hardly adequate to show that, had it been presented at trial, no reasonable juror would have
 26 convicted the petitioner." McQuiggin, 133 S.Ct. at 1936.

27 However, contrary to Respondents' argument, there is nothing in McQuiggin that altered the
 28 binding Ninth Circuit precedent. McQuiggin did not hold that "new evidence" under the Schlup

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1 standard must be “newly discovered evidence.” It was not even a question at issue in that case. As such,
2 the decision in McQuiggin clearly is not enough to overcome law of the case here.

3 Moreover, Respondents’ reading of this non-essential language in McQuiggin is exceedingly
4 overbroad and not justified based on the context in which it appears. In that decision, the Supreme Court
5 made two holdings: actual innocence can be used to overcome a time bar and there is no due diligence
6 requirement to presenting the claim, but that the timing of claim bears on its credibility. Id. at 1931-36.
7 After reaching these holdings, the Court turned to the case before it and stated the following:

8 We now return to the case at hand. The District Court proceeded
9 properly in first determining that Perkins’ claim was filed well beyond
10 AEDPA’s limitations period and that equitable tolling was unavailable to
11 Perkins because he could demonstrate neither exceptional circumstances
12 nor diligence. See *supra*, at 1930. The District Court then found that
13 Perkins’ alleged newly discovered evidence, *i.e.*, the information
14 contained in the three affidavits, was “substantially available to [Perkins]
15 at trial.” App. to Pet. for Cert. 31a. Moreover, the proffered evidence,
16 even if “new,” was hardly adequate to show that, had it been presented
17 at trial, no reasonable juror would have convicted Perkins. *Id.*, at
18 30a–31a.

19 The Sixth Circuit granted a certificate of appealability limited to
20 the question whether reasonable diligence is a precondition to reliance on
21 actual innocence as a gateway to adjudication of a federal habeas petition
22 on the merits. We have explained that untimeliness, although not an
23 unyielding ground for dismissal of a petition, does bear on the credibility
24 of evidence proffered to show actual innocence. On remand, the District
25 Court’s appraisal of Perkins’ petition as insufficient to meet *Schlup*’s
26 actual-innocence standard should be dispositive, absent cause, which we
27 do not currently see, for the Sixth Circuit to upset that evaluation. We
28 stress once again that the *Schlup* standard is demanding. The gateway
should open only when a petition presents “evidence of innocence so
strong that a court cannot have confidence in the outcome of the trial
unless the court is also satisfied that the trial was free of nonharmless
constitutional error.” 513 U.S., at 316, 115 S.Ct. 851.

22 McQuiggin, 133 S.Ct. at 1936.

23 The Court’s analysis here does not, in any way, undermine the Ninth Circuit’s decision in Griffin.
24 Nowhere in this language did the Court suggest that “new evidence” must be “newly discovered
25 evidence.” At most, the Court was indicating that the district court’s overall approach was consistent
26 with its holding in McQuiggin that timing is a relevant factor in determining, as a substantive matter,
27 whether the petitioner’s evidence of innocence is sufficient to meet the Schlup standard. Under
28 McQuiggin, “newly presented” evidence can still satisfy the Schlup standard so long as there is no

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1 “unexplained delay” in presenting it.² And as stated before, that is simply not the case here.

2 **C. Johnny’s Testimony that He Acted Alone Was Trustworthy**

3 Respondents argue that Johnny’s hearing testimony that he was solely responsible for the
4 shooting was not trustworthy. They predominantly rely upon Johnny’s prior statements in his
5 presentence report and at his sentencing that he did not commit the crime. CR 77 at 18.

6 This argument is unpersuasive. In the first instance, as discussed in the opening brief, there were
7 numerous reasons to find his version reliable – among other things, it was consistent with the trial
8 evidence, it was consistent with statements that both his own attorney and Christian’s attorney had made
9 before trial, it was consistent with his 2002 affidavit, and it was consistent with a statement he made to
10 his Uncle Gerald before he was even arrested.³ Indeed, Johnny had been trying to tell people from “day
11 one” that Christian was innocent. Thus, in light of the numerous ways in which the testimony was
12 reliable, it is reasonable to conclude that it is more likely than not that a jury would find it trustworthy.

13 Johnny’s prior denials of responsibility do not alter this. What is critical here is that the jury
14 would know the context of when those were made. Johnny made those statements after he was
15 convicted of a crime. As such, Johnny’s explanations for why he made them were logical. They were
16 reactionary. Whether it was because he did not believe he should have been convicted of a battery
17 because the shooting was accidental, or he was acting out as a result of the conviction, or he was simply

18
19 ² Respondents argue that a “newly presented” standard is unfair because it allows a
20 petitioner to sit on actual innocence evidence and then use it as a mechanism to sandbag the system to
21 gain a second trial. CR 77 at 14. This argument is specious. A defendant has no incentive to withhold
22 evidence of innocence from a jury just to later use it to collaterally challenge a conviction. Any rational
23 defendant would want to avoid a conviction in the first place. Further, the “actual innocence” evidence
24 does not lead to a new trial. It is only used to overcome a procedural default. A petitioner must still
25 show constitutional error to obtain a new trial. Thus, the benefit of holding it back is minimal. Finally,
it would be unfair to Walker to require that the evidence be newly discovered as one of his underlying
claims was that his attorney was ineffective for failing to present the actual innocence evidence. See
Gomez v. Jaimet, 350 F.3d 673, 679-80 (7th Cir. 2003) (“Particularly in a case where the underlying
constitutional violation claimed is the ineffective assistance of counsel premised on a failure to present
evidence, a requirement that new evidence be unknown to the defense at the time of trial would operate
as a roadblock to the actual innocence gateway.”).

26 ³ Respondents challenge the timing of Gerald’s testimony. However, it was clear from
27 Gerald’s raised voice when discussing this at the hearing that he was hurt and angry that no one ever
28 asked him about what he knew about the case. It can be inferred that his pride was wounded when no
one approached him. Further, it was not as simple for him as whether or not he should come forward
with exonerating evidence for his son. The evidence that he had to offer inculpated one of his own
family members, who had lived with him as a child.

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1 being a “knucklehead,” a jury would not find those prior statements to be reliable. CR 74, p. 80. The
2 jury had just been told by the State in their opening statement at Christian’s trial: “May it please the
3 Court, Counsel, Ladies and Gentlemen of the jury, on September 22nd of 1997, Johnny Walker shot
4 David Dimas. Johnny Walker Shot him.” Ex. 18 at 17-18. Johnny would now be telling them under
5 oath that this was correct, he shot Dimas. A jury would have no reason to discredit this testimony in
6 light of the prior statements, which obviously were not accurate.

7 More important, the trial evidence fully supported Johnny’s testimony that he acted alone:
8 Christian was just standing there when it happened and never said anything to Johnny before the
9 shooting. As the Ninth Circuit concluded, “No witness spoke directly about [Christian’s] intent to kill
10 Dimas, and no witness testified that Johnny Walker acted on Walker’s instruction and not on his own
11 impulse.” (CR 41 at 6). Overall, the reasons to find Johnny’s testimony reliable far outweigh the
12 potential challenge to his credibility from the prior statements. The prior statements are entirely
13 insignificant when put in their proper context.

14 Respondents’ remaining arguments should be rejected. Respondents argue that the reliability
15 of Johnny’s testimony was undermined because the letter that he sent to Fadgen was never produced.
16 CR 77 at 17. But the question of whether or not Johnny put his confession in a letter to Fadgen is a moot
17 point. There simply can be no doubt that Fadgen learned that Johnny wanted to testify and intended to
18 take full blame for what happened. He clearly asserted that in the severance motion. Exs. 3, 5. Further,
19 Johnny’s attorney acknowledged as much in his pleading in support of the severance motion. Ex. 4.
20 Fadgen took every step to call Johnny as a witness, listing him on the witness list and then obtaining a
21 subpoena to have him appear. Exs. 8, 16-7. Thus, it was always the case that Johnny intended to offer
22 exculpatory evidence. It is not necessary to produce the letter to prove that. Similarly, Respondents’
23 argument that Johnny and Christian conspired together in Ely State Prison in 2002 to come up with this
24 plan to exonerate Christian is simply ludicrous. Fadgen’s affidavit disproves this entirely. Ex. 5. Indeed,
25 Ken Lake testified at the hearing that Christian had nothing to do with the affidavit. He obtained the
26 affidavit on his own while working on Christian’s case. CR 74, p. 95-8. Respondents do not provide
27 any coherent argument as to why Lake’s testimony was unreliable.

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1 Respondents argue that Johnny's testimony should be rejected because Johnny faced a difficult
2 cross-examination and Fadgen "could see it coming made the decision not to call Johnny Walker to the
3 stand even though he had properly noticed Johnny as a witness and had arranged for his availability."
4 CR 77 at 7-8. This argument has no basis in law or fact. First, Fadgen's reasons for not calling Johnny
5 as a witness are irrelevant to the substantive aspect of the Schlup analysis. As the Supreme Court made
6 clear in House v. Bell, 547 U.S. 518, 538 (2006), the only relevant analysis is for this Court to make a
7 holistic judgment about all the evidence and its likely effect on reasonable jurors applying the
8 reasonable-doubt standard. The potential reasons why Fadgen did not call Johnny as a witness play no
9 part in that analysis. The only relevant facts here are what are actually known, namely the timeline of
10 events: Johnny was sentenced on October 20, 1998. Ex. 15. Three days later, Fadgen moved ex parte
11 to obtain a subpoena, compelling Johnny to testify at Christian's trial. Ex. 16. Thus, contrary to what
12 Respondents suggest, Fadgen sought Johnny's appearance at trial even after Johnny had made the
13 inconsistent statements that supposedly undermined his credibility. Thus, there is no reason to believe
14 that this was the reason why Fadgen did not call Johnny. And, as noted above, Fadgen's reasoning is
15 irrelevant to the question before this Court.

16 Respondents also suggest that Johnny could have been impeached with the defense he presented
17 at his trial, namely that he was not the shooter. CR 77 at 7. However, this simply is not true. Johnny
18 has a constitutional right to a jury trial and to have the prosecution prove its case beyond a reasonable
19 doubt. Johnny had the right to present a defense. Clearly, his exercise of those constitutional rights
20 cannot be used against him in this way. Moreover, none of the statements made at the prior trial were
21 his statements. They were his attorney's statements. Johnny cannot be impeached with statements made
22 by other people. Further, it cannot even be shown that his attorney's statements could be attributable
23 to Johnny. His attorney has the authority to choose the defense at trial. That defense is not necessarily
24 based on statements from the defendant. And, even if it was, any statement from Johnny to his attorney
25 is protected by attorney-client confidentiality. His attorney would not be able to confirm or deny that
26 the statements were actually Johnny's. Thus, because there were no actual statements from Johnny, he
27 could not be impeached with anything that happened at his trial. Indeed, even Respondents' own witness
28 did not state that she would impeach Johnny with anything that occurred at his trial, only the statements

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1 that he made after trial. CR 74 at 109, 114-15.

2 Finally, Respondents argue that the State's theory at trial that Christian conspired with Johnny
3 to commit the shooting was more credible. CR 77 at 12. But this theory did nothing more than ask the
4 jury to draw an inference that Christian was involved in the shooting. There was no direct evidence that
5 Johnny and Christian had developed a plan to shoot Dimas. And the evidence at the trial did not
6 necessarily support it as there was no indication that Christian had any desire to harm Dimas. This is
7 precisely why Johnny's testimony was so critical. It destroyed the inference that the State asked the jury
8 to draw. It was direct evidence that Johnny was acting out his own misguided plan to scare Dimas. Put
9 simply, no reasonable juror would convict Christian of this crime *when his co-defendant specifically*
10 *testifies that Christian was not involved in the crime.*

11 **IV. CONCLUSION**

12 For the reasons stated herein and in the Opening Brief, Christian has established that, in light of
13 the new evidence in conjunction with the record as a whole, it is more likely than not that no reasonable
14 juror would find him guilty of attempt murder with the use of a weapon. This Court should review the
15 merits of Christian's untimely petition.

16
17 DATED this 10th day of November, 2014.

18 Respectfully submitted,

19 LAW OFFICES OF THE
20 FEDERAL PUBLIC DEFENDER

21 By: /s/ Megan C. Hoffman
22 MEGAN C. HOFFMAN
Assistant Federal Public Defender

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on November 10, 2014, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Thom Gover
Chief Deputy Attorney General
Office of the Attorney General
555 East Washington Ave. #3900
Las Vegas, NV 89101

/s/ Susan Kline
An Employee of the Federal Public Defender,
District of Nevada

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 4 Nevada Bar #000477
 5 200 S. Third Street
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 7 (702) 455-4711
 8 Attorney for Plaintiff

DISTRICT COURT
 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 CHRISTIAN D. WALKER,
 12 #1507623

13 Defendant.

Case No. C146419B
 Dept. No. XVI
 Docket U

14
 15 JUDGMENT OF CONVICTION (JURY TRIAL)

16 WHEREAS, on the 12th day of November, 1997, the Defendant CHRISTIAN D.
 17 WALKER, entered a plea of not guilty to the crimes of COUNT I - MURDER WITH USE OF
 18 A DEADLY WEAPON (Open Murder) (Felony) and COUNT III - VIOLATION OF
 19 TEMPORARY CUSTODY ORDER (Gross Misdemeanor), committed on the 22nd day of
 20 September, 1997, in violation of NRS 200.010, 200.030, 193.165, 200.591, and the matter
 21 having been tried before a jury, and the Defendant being represented by counsel and having been
 22 found guilty of the crime of ATTEMPT MURDER WITH USE OF A DEADLY WEAPON
 23 (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); and

24 WHEREAS, thereafter, on the 5th day of January, 1999, the Defendant being present in
 25 Court with his counsel JOHN P. FADGEN, Esq., and LISA LUZAICH, Deputy District
 26 Attorney also being present; the above entitled Court did adjudge Defendant guilty thereof by
 27 reason of said trial and verdict and, in addition to the \$25.00 Administrative Assessment Fee,
 28 sentenced Defendant to a minimum term of Forty-Eight (48) months and a maximum term of

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1 One Hundred Twenty (120) months in the Nevada Department of Prisons for Attempt Murder,
2 with an equal and consecutive sentence of Forty-Eight (48) months to One Hundred Twenty
3 (120) months for the enhancement of With Use of a Deadly Weapon. The Defendant is granted
4 453 days credit for time served

5 THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this
6 Judgment of Conviction as part of the record in the above entitled matter.

7 DATED this 14th day of January, 1999, in the City of Las Vegas, County of Clark,
8 State of Nevada.

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11 DISTRICT JUDGE *re*
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26 DA#97-146419B/msr
27 LVMPD EV#9709222319
28 ATTMURD W/W - F
(TK 6)