Preparing and Winning State Post-Conviction Cases: An Overview
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December 5, 2019

I. General provisions.

"[H]abeas corpus is a proceeding which should be characterized as neither civil nor criminal for all purposes. It is a special statutory remedy which is essentially unique." Hill v. Warden, 96 Nev. 38, 40 (1980).

A. Purpose

1. Seek relief from a JOC or sentence in a criminal case (NRS 34.720); or
2. Challenge computation of time served pursuant to JOC (NRS 34.720).
3. This is *not* a second direct appeal – you're going to have to go outside the record.

B. Jurisdiction

1. A petition that challenges the validity of a conviction or sentence must be filed in the district court for the county in which the conviction occurred. NRS 34.738(1).
2. A petition that challenges the computation of time served must be filed in the district court for the county in which the petitioner is incarcerated. NRS 34.738(1).
3. No mixed petitions. A single petition cannot challenge both the validity of the conviction *and* computation of time. NRS 34.738(3).

C. Standing

1. In custody
   a. Writs may issue "on petition by . . . any person . . . who *has suffered a criminal conviction* in their respective districts & *has not completed the sentence imposed* pursuant to the judgment of conviction." NEV. CONST. ART. 6 § 6(1) (emphasis added); NRS 34.724(1).
   b. A person who is on probation or parole is "under a sentence of imprisonment." *Coleman v. State*, 321 P.3d 863 (Nev. 2014).
   c. *But* An inmate under the special sentence of "lifetime supervision" is *not in custody* and therefore cannot file a

petition for a writ of habeas corpus challenging his sentence. *Id*.

II. The petition.

A. Before you start, you must conduct an pre-petition investigation, which at a minimum includes:

1. Ordering the entire court record and obtain all the transcripts.
2. Visiting the evidence vault and examine the evidence.
3. Reviewing all plea deals for state witnesses.
4. Obtaining all prior counsel files.
    a. Trial counsel.
    b. Appellate counsel.
    c. Investigator files.
    d. Expert files.
5. Interviewing client in person.
6. Speaking to prior counsel.
7. Interviewing witnesses.

B. Pleading the petition.

1. Go beyond "specific allegations" and include:
    a. Declarations/affidavits
    b. Court records/transcripts
    c. Letters written to/from counsel and other witnesses
    d. Motion for discovery that includes a specific proffer of what you expect to obtain
    e. Request for funding for an expert or investigator
    f. Request for evidentiary hearing

C. Form.

1. Must be in substantially the form set forth in NRS 34.735 and be titled "Petition for Writ of Habeas Corpus (Post-Conviction)." NRS 34.730(2).
2. Must name as the respondent "the officer or other person by whom the petitioner is confined or restrained." NRS 34.730(2); *see also* NRS 34.735.

a. That would be the Warden, et al. Nonetheless, petitions often name the State of Nevada and/or the AG as the respondent.

b. And even if you properly name the warden, expect the DA's office (and even the court) to re-caption the case using "State of Nevada."

3. Petition challenging the validity of a conviction/sentence will be assigned to the judge or court that presided over the original criminal proceedings. NRS 34.730(3)(b).

a. BUT Clark County is now filing some habeas petitions in civil cases and requiring a civil cover sheet. In that situation, include the criminal case number on the caption and a motion to take judicial notice of the criminal case record so you don't have to refile it.

D. Technical Requirements.

1. Fee.

a. Petitioner not required to pay a filing fee. NRS 34.724(1).

2. Verification.

a. The petition must be signed by the petitioner and verified by the petitioner or his counsel. NRS 34.735; NRS 34.730(1).

(1) If the petition is verified by counsel, then counsel also must verify that the petitioner personally authorized counsel to file the petition. NRS 34.730(1).

(2) Inadequate verification or service is not a jurisdictional defect & may be cured through amendment. *See Miles v. State*, 120 Nev. 383 (2004).

3. Service.

a. Petition challenging JOC/sentence must be served by mail on:

(1) Warden (and Direct of NDOC to be safe)

(2) AG

(3) DA in the county in which petitioner was convicted

b. Petition challenging time computation must be served by mail on:

(1) Warden

(2) AG

E. Supplementing the petition.

1. If you are appointed after the petitioner has already filed a pro se petition, file supplemental pleadings. NRS 34.750(3).

a. **Do not abandon** the pro se claims unless you believe them to be entirely frivolous. Supplement them!

b. You get to supplement as a matter of right within 30 days of appointment OR from the date the court orders the filing of an answer. NRS 34.750.

2. The district court has broad discretion to order supplemental pleadings. *See Miles v. State*, 120 Nev. 383 (2004); NRS 34.750(5).

3. A supplemental petition relates back to the filing date of the original petition. *State v. Powell*, 122 Nev. 751 (2006).

F. Evidentiary development.

1. State law requirements: hearing required when an adequate proffer is made. NRS § 34.770

2. Federal law requirements – federal habeas review is limited to the record before the state courts below. *Cullen v. Pinholster*, 563 U.S. 170 (2011).

a. 28 U.S.C. § 2254(e)(2): "a federal court shall not hold an evidentiary hearing on a claim if the petitioner has failed to develop the factual basis for the claim in state court . . . ." (emphasis added)

b. Must proffer affidavits: Petitioner "should have obtained and presented affidavits and testimony at issue in the state habeas proceedings. . ." *Ward v. Hall*, 592 F.3d 1144, 1159 (11th Cir. 2010).

3. Best practice: request an evidentiary hearing, experts, investigation, etc. at every available opportunity, in every pleading and hearing.

4. "**After the writ has been granted, and a date set for the [evidentiary] hearing**, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure

if, and to the extent that, the judge or justice for good cause shown grants leave to do so." NRS 34.780(2) (emphasis added)

G. Response or Answer

1. The state is not required to respond to a petition until the district court orders it to do so.

2. If it is petitioner's first petition, the district court must order the prosecuting authority to file a response or answer or to "[t]ake other action that the judge . . . deems appropriate." NRS 34.745(1)(a)(1), (b).

3. Response due "within 45 days or a longer period fixed by the judge." NRS 34.745(1)(a).

H. Reply.

1. An Opposition/Reply should be filed in every case in which the state files a response/motion to dismiss.

2. Alternatively, a Reply should be filed in every case in which an Answer or response on the merits is filed by the Respondents.

a. "The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. … If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, the judge or justice shall dismiss the petition without a hearing." NRS 34.770(1) & (2)

b. *See also generally* DCR 13(3) and NRS Chapter 34 procedures.

III. Exclusive remedies

A. Non-habeas remedies for relief from a conviction or sentence).

1. Motion for Modification of Sentence. *Edwards v. State*, 112 Nev. 704 (1996).

2. Motion to Correct an Illegal Sentence. *Edwards v. State*, 112 Nev. 704 (1996).

3. Motions for New Trial Based on Newly Discovered Evidence. *Hart v. State*, 116 Nev. 558, n.4 (2000).

4. Motions to Withdraw a Plea of Guilty, Guilty but Mentally Ill or Nolo Contendere. NRS 34.724(3). Test:

a. The person motion is filed within 1 year after the date on which the person was convicted, unless the person pleads specific facts demonstrating that some impediment external to the defense precluded bringing the motion earlier;

b. The motion is filed within 1 year after the date on which the person was convicted, unless the person pleads specific facts demonstrating that some impediment external to the defense precluded bringing the motion earlier

c. At the time the person files the motion to withdraw the plea, the person is not incarcerated for the charge for which the person entered the plea; and

d. The motion is not barred by the doctrine of laches. A motion filed more than 5 years after the date on which the person was convicted creates a rebuttable presumption of prejudice to the State on the basis of laches.

5. Motion to Set Aside a Death Sentence Based on Mental Retardation. NRS 175.554.

IV. Procedural Bars

A. Timeliness

1. Petition must be filed within one year after entry of the judgement of conviction or, if an appeal was taken from the judgment of conviction, within one year after the Nevada Supreme Court issues its remittitur. NRS 34.726(1).

a. Use the date the remittitur was signed by the Nevada Supreme Court clerk.

2. The prison mailbox rule does not apply. The petition must be filed by the clerk within the one-year timeframe. *See Gonzales v. State*, 53 P.3d 901 (Nev. 2002).

3. In computing the time period, the date the judgment is entered or the remittitur is issued is not included & if the last day falls on a Saturday, Sunday, or a non-judicial day, the 1-year period runs until the end of the next judicial day. *See* NRS 178.472; *see also Gonzales*, *supra*, at n.7.

4. The one year period begins to run from the entry of JOC unless Petitioner files a timely direct appeal. *Dickerson v. State*, 114 Nev. 1084 (1998).

a. If the petitioner did not file a timely direct appeal from the JOC, the time begins to run from the date that the JOC was entered.

b. If the Petitioner voluntarily dismisses a timely direct appeal, the one year period for filing a petition starts running upon entry of the Nevada Supreme Court's order granting the voluntary dismissal because the court does not issue a remittitur after a voluntary dismissal. *Gonzales*, 114 Nev. at 596, n.18.

c. If the petitioner was allowed to file an untimely direct appeal pursuant to NRAP 4(c), the 1-year period for filing a petition begins to run from the date that the NSC issues its remittitur in the untimely direct appeal. NRAP 4(c)(4).

5. All petitions must be timely filed, including second or successive petitions. *Pellegrini v. State*, 117 Nev. 860 (2001).

6. The federal clock is the same clock as the state clock. There is NOT an additional year to file federal habeas.

   a. Do not let all of your hard work be for naught. Counsel's ignorance or attorney's bad advice to petitioner does not excuse an untimely federal filing. *See Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001) (federal standard re equitable tolling is extraordinary circumstances beyond the prisoner's control make it impossible to file on time. "Garden variety" attorney negligence does not warrant tolling).

7. You have an ethical obligation under ADKT No. 411 to calculate a habeas timeline for your client's case.

   a. NRPC 1.1 (competence), NRPC 1.3 (diligence), NRPC 1.4 (communication).

8. Do not use 364 days to file the state petition.

   a. This will make the petitioner's (or if s/he is lucky, counsel's) life miserable and my blow the federal remedy away if there is not adequate time to file timely AEDPA federal petition.

B. Laches

1. Petition must be dismissed if delay in filing the petition prejudices the State in responding to the petition or in its ability to retry the petitioner. NRS 34.800(1)

   a. Unless "the petitioner shows that the petition us based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800(1)(a).

   b. Unless "the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b).

2. The statute creates a rebuttable presumption of prejudice to the State when the delay in filing the petition exceeds 5 years from the entry of the JOC or a decision on direct appeal from a judgment of conviction. NRS 34.800(2).

   a. The district court cannot rely on NRS 34.800 to dismiss a petition unless the State specifically pleads laches in a motion to dismiss. NRS 34.800(2). When the state does plead laches, the district court must give the petitioner an opportunity to respond to the motion before ruling on it. *Id*.

C. Guilty plea cases.

1. Limits on challenges to guilty pleas are governed by NRS 34.810(1)(a).

2. A petition that challenges a conviction based on a plea of guilty or guilty but mentally ill is limited to allegations that the plea:

   a. Was involuntarily or unknowingly entered; or,

   b. Was entered without effective assistance of counsel.

3. Talk to your client, family members. Difficult to adequately develop these claims without discussion, investigation. Prepare and file affidavits, ask for hearing.

   a. NRCP 1.4 (Communication), NRCP 1.3 (Diligence), ADKT 411, Standard 2(b).

D. Waiver.

1. A petition that challenges conviction based on jury verdict is limited to claims that could not have been raised in a prior proceeding (at trial, on direct appeal, or in a prior post-conviction petition). NRS 34.810(1)(b).

a. Claims that could have been considered in a prior proceeding are waived.

b. The district court must dismiss any claims that could have been raised in a prior proceeding unless court finds:

(1) Cause for the procedural default & actual prejudice (NRS 34.810(1)(b)); or,

(2) That failure to consider the claims would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887.

2. Petitioner has the burden of pleading & proving specific facts to demonstrate good cause and prejudice. NRS 34.810(3); see also *State v. Haberstroh*, 119 Nev. 173, 69 P.3d 676 (2003).

E. Second or successive.

1. If the petitioner previously has filed a post-conviction petition, the court must dismiss a second or successive petition when:

a. The petition fails to allege new and different grounds for relief and the prior determination on the claims was on the merits; or,

b. The petition raises new and different grounds for relief but the petitioner's failure to assert those grounds in a prior petition constitutes an "abuse of the writ." NRS 34.810(2)

V. Excusing or overcoming procedural bars.

A. The district court **must dismiss** an untimely petition under NRS 34.726 unless the petitioner shows good cause for the delay. *See State v. Dist. Ct. (Riker),* 121 Nev. 225 (2005).

B. The procedural bars may be overcome by a showing of good cause and prejudice or a fundamental miscarriage of justice.

1. The Nevada Supreme Court has applied the same standards for determining good cause and prejudice to overcome the procedural bars for untimely petitions under NRS 34.726, waived claims under NRS 34.810(1)(b), and second or successive

petitions under NRS 34.810(2). *See, e.g., Pellegrini*, 117 Nev. at 886-87, 34 P.3d at 537.

C. Good Cause

1. Petitioner must demonstrate that an impediment **external to the defense** prevented him from complying with the procedural requirements. *State v. Dist. Ct. (Riker)*, 121 Nev. 225 (2005); *Pellegrini*, 117 Nev. at 886.

2. Good cause exists if the petitioner demonstrates:

   a. That the delay was not the petitioner's fault & dismissal of the petition as untimely would unduly prejudice the petitioner (NRS 34.726(1)) or,

   b. Failure to consider the claims would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860 (2001).

3. Good cause means "a substantial reason, one that afford a legal excuse." *Hathaway v. State*, 119 Nev. 248 (2003).

4. Petitioner has the burden of pleading and proving "specific facts" demonstrating good cause and actual prejudice. NRS 34.810(3); *see also State v. Haberstroh*, 119 Nev. 173, 69 P.3d 676 (2003).

   a. Additionally, the state has no burden to prove that the petitioner knowingly and intelligently waived the grounds for relief. *Ford v. Warden*, 111 Nev. 872 (1995).

5. Examples of good cause:

   a. The factual basis for a claim was not reasonably available. Pellegrini, 117 Nev. at 886-87.

   b. The legal basis for a claim was not reasonably available. *Pellegrini*, 117 Nev. at 886-87.

      (1) Both the factual and legal basis must be raised within a reasonable amount of time after they become available. *Pellegrini*, *supra*.

      (2) NSC has defined a "reasonable" amount of time:

         (a) We therefore conclude that a claim of ineffective assistance of postconviction counsel has been raised within a reasonable time after it became available so long as the postconviction petition is filed within one year after entry of the district court's order

disposing of the prior postconviction petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur." *Rippo v. State*, 368 P.3d 729, 740 (Nev. 2016) (overruled on other grounds by *Rippo v. Baker*, 137 S.Ct. 905 (2017)).

c. Official interference made compliance with the procedural requirement impracticable. *Pellegrini*, 117 Nev. at 886-87.

d. Ineffective assistance of trial or appellate counsel. *Hathaway*, 71 P.3d at 506-507.

e. Ineffective assistance of post-conviction counsel in capital cases. *Crump v. Warden*, 934 P.2d 247 (1997).

f. Deprivation of right to an appeal if the petitioner:

(1) Asked counsel to file an appeal;

(2) Reasonably believed that counsel had filed an appeal; and,

(3) Filed the petition within a reasonable time after learning that a direct appeal had not been filed. *Hathaway v. State*, 71 P.3d 503 (Nev. 2003).

6. Examples of common allegations that are **not** good cause:

a. Trial counsel's failure to send a petitioner his or her file. *Hood v. State*, 111 Nev. 335 (1995).

b. Petitioner's limited intelligence & reliance on an unschooled inmate law clerk for assistance. *Phelps v. Director, Prisons*, 104 Nev. 656 (1988).

c. Petitioner's pursuit of habeas corpus relief in federal court. *Colley v. State*, 105 Nev. 235 (1989).

d. Failure to raise claim in a reasonable time after claim became available.

e. Claims, such as ineffective assistance of counsel, that are themselves procedurally barred. *See Hathaway; Harris v. Warden*, *clarified by Hathaway*.

f. Claims of ineffective assistance of post-conviction counsel in a non-capital case, or claims where petitioner did not have counsel in the initial post-conviction proceedings. *Brown v. McDaniel*, 331 P.3d 867 (Nev. 2014)

D. Prejudice

1. Petitioner must demonstrate not just that the claimed errors "'created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Riker v. Eighth Judicial Dist. Ct.*, 112 P.3d 1070 (Nev. 2005), *quoting United States v. Frady*, 456 U.S. 152 (1982); *see also Hogan v. Warden*, 860 P.2d 710 (Nev. 1993).

2. Absent the constitutional errors, reasonable probability that the petitioner would not have been found guilty.

3. In Nevada, after a specific request for evidence, a *Brady* violation establishes prejudice if the evidence was material – whether a reasonable possibility exists of a different result had there been disclosure. *Mazzan v. Warden*, 993 P.2d 25 (Nev. 2000); *State v. Bennett*, 993 P.2d 25 (Nev. 2003).

E. Fundamental Miscarriage of Justice

1. When a petitioner cannot demonstrate good cause, the district court may nonetheless excuse a procedural bar if petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887.

2. When claiming a fundamental miscarriage based on actual innocence, the petitioner thus must show that "it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." *Id*.

   a. In this context, actual innocence means "factual innocence, not mere legal insufficiency." *Mitchell v. State*, 149 P.3d 33 (Nev. 2006).

3. Similarly, when claiming fundamental miscarriage based on ineligibility for the death penalty, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." *Pellegrini*.

4. Examples: *Brady* evidence, recanting victim, scientific evidence undermining State's theory of death, development of science.

F. *Lozada* claims.

1. Counsel has a constitutionally imposed duty to consult with his client about an appeal "when there is reason to think either

a. that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or

b. that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000); *Lozada v. State*, 871 P.2d 944 (Nev. 1994).

2. When the conviction is the result of a guilty plea, there is no constitutional requirement that counsel inform a defendant of the right to appeal unless

a. the defendant inquires about an appeal or

b. the defendant may benefit from the advice because of the existence of a direct appeal claim that has a reasonable likelihood of success. *Thomas v. State*, 979 P.2d 222 (Nev. 1999); *see also Roe v. Flores-Ortega*, 528 U.S. 470.

3. Remedy Under NRAP 4(c)(1)

a. Petitioner permitted to file an untimely notice of appeal if:

(1) A post-conviction petition has been timely-filed asserting an appeal deprivation claim;

(2) The state court enters a written order making specific findings:

(a) that petitioner has established an appeal deprivation claim
(b) if petitioner is indigent, directions for appointment of counsel
(c) direction to the court clerk to prepare and file a notice of appeal within 5 days of the entry of the order.

VI. Deciding the petition: findings of fact/conclusions of law.

A. Order Prepared by Prevailing Party

1. The district court "may request a party to submit proposed findings of facts and conclusions of law." NCJC Canon 3B(7) cmt.

a. If the court does so, however, it first "must make a ruling and state its findings of fact and conclusions of law before [the prevailing party] can draft a proposed order for the district court's review." *Byford v. State*, 156 P.3d 691 (Nev. 2007).

2. The court also must ensure that "the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions." NCJC Canon 3B(7) cmt.

3. Finally, the court must ensure that the proposed order drafted by the prevailing party accurately reflects the district court's findings & conclusions. *See Byford v. State*.

B. Objections

1. Object to assigning the drafting of the order to the state. In the alternative, ask for a deadline for your objections before the court signs the order.

   a. If the court refuses both, file objections as soon as possible after the court signs the order and before you file a Notice of Appeal.

   b. The objections **do not** toll the deadline for filing a Notice of Appeal.

2. At a recent CLE, Justice Stiglitch opined that this is an area ripe for review and encouraged counsel to object to this practice.

3. There are several cases to use as a basis for your objections:

   a. *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985): "We . . . have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record."

   b. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615, fn.13 (1974) (noting that the lower court's verbatim adoption of the pre-vailing party's proposed findings of fact "failed to heed this Court's ad-monition voiced a decade ago.")

   c. *United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 656–57 & fn.4 (1964): "Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules."

d. *In re Colony Square*, 819 F.2d 272, 274 (11th Cir. 1987) (citations and footnotes omitted): "The quality of judicial decision making suffers when a judge delegates the drafting of orders to a party; the writing process requires a judge to wrestle with the difficult issues before him and thereby leads to stronger, sounder judicial rulings."

e. *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 458 (4th Cir. 1983): the court has repeatedly condemned the practice of adopting the prevailing party's proposed findings of facts and conclusions of law.

f. *In re Discipline of Schaeffer*, 25 P.3d 191, 195–96 (Nev. 2001), as modified by Order Denying Rehearing (Sept. 10, 2001) (disbarring an attorney for, *inter alia*, submitting a proposed order that contradicted a prior oral ruling).

g. *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 732 (3rd Cir. 2004): "Judicial opinions are the core work-product of judges.... When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions."

h. *Chicopee Mfg. Co. v. Kendall Co.*, 288 F.2d 719, 724–25 (4th Cir. 1961): criticizing a district court's adoption of an opinion prepared by the prevailing party as "the failure of the trial judge to perform his judicial function."

C. Things to look for when appealing the denial

1. Where there conclusions made that determined the truth of any factual allegations with an evidentiary hearing?

a. The court cannot grant relief that discharges or changes the petitioner's custody unless an evidentiary hearing is held. NRS 34.770(1).

2. Are their Findings and Conclusions?

a. "Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court." NRS 34.830(1); *see also* NRAP 4(b)(2).

3. Did the order resolve all claims?

a. Review carefully and challenge all claims!

b. An order is not final until all claims raised in the proceedings have been resolved.

c. The district court's final order, unless prior intermediate orders have been entered, must resolve all claims that were raised in the petition & any supplemental documents that the petitioner has been permitted to file.

4. Do **not** drop any claims (including *pro se* ones from the original petition even if you don't agree with their strength).

   a. Re-raise and federalize *all* of them.

5. Do **not** simply appeal on the basis that the district court should have granted the petition or a hearing.

   a. If you do, and do not win in the Nevada Supreme Court, you sink all of the claims in federal court.