NEVADA POSTCONVICTION PROCEEDINGS: A GUIDE FOR DISTRICT COURT JUDGES

This guide was prepared by attorneys employed in the central legal staff at the Nevada Supreme Court and the Nevada Court of Appeals. It is not intended to express the opinion of the Nevada Supreme Court or the Nevada Court of Appeals. It is provided as an educational or research tool for district court judges and their staff. Users are strongly encouraged to read the cases and statutes and conduct independent research. Legislation may have changed and/or the cases cited may have been amended, withdrawn, or overruled since the guide was last updated in February 2019.

TABLE OF CONTENTS

I. POSTCONVICTION PETITION FOR A WRIT OF HABEAS CORPUS

A. GENERAL PROVISIONS

1. INTRODUCTION

The right to seek the remedy of habeas corpus is protected by Article 1, Section 5 of the Nevada Constitution. Since 1993, Nevada law has provided that, with a few exceptions discussed in these materials, a postconviction petition for a writ of habeas corpus is the exclusive means of challenging the validity of a conviction or sentence and the computation of time served. NRS 34.724(2)(b), (c).

A postconviction petition for a writ of habeas corpus may be used to:

- ✓ Seek relief from a judgment of conviction or sentence, or
- ✓ Challenge the computation of time served pursuant to a judgment of conviction.

NRS 34.720, 34.722. A habeas petition cannot be used to challenge the conditions of confinement or the manner in which a sentence is carried out. McConnell v. State, 125 Nev. 243, 247-48, 212 P.3d 307, 310-11 (2009); Bowen v. Warden, 100 Nev. 489, 686 P.2d 250 (1984).

"[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, 604 P.2d 807, 808 (1980).

2. JURISDICTION: WHERE IS THE PETITION FILED?

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).

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).

If a petition is filed in the wrong court, the clerk of that court must transfer the petition to the correct district court. In this situation, the petition is treated as having been filed on the date it was received in the court in which it originally was filed. NRS 34.738(2).

3. MIXED PETITION: CHALLENGES JUDGMENT AND COMPUTATION OF TIME SERVED.

A single petition may not challenge both the judgment of conviction and the computation of time served. NRS 34.738(3). This is because the claims must be filed in different courts—the challenge to the judgment of conviction is filed in the county in which the conviction occurred whereas the challenge to the computation of time served is filed in the county in which the petitioner is incarcerated. NRS 34.738(1).

When a petition does challenge both the judgment of conviction and the computation of time served, the district court should resolve the petition to the extent of the court's jurisdiction and dismiss the remainder of the petition without prejudice. *Id.*

4. TECHNICAL REQUIREMENTS

The petitioner is not required to pay a filing fee. NRS 34.724(1).

The petition must be *signed* by the petitioner and *verified* by the petitioner or his counsel. NRS 34.735; NRS 34.730(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). An inadequate verification is **not** a jurisdictional defect and therefore may be cured through an amendment. See *Miles v. State*, 120 Nev. 383, 91 P.3d 588 (2004), for a discussion of the verification requirement and the circumstances in which an inadequate verification may be cured.

The petition must be *served* by mail on the Nevada Attorney General and, if the petition seeks relief from a judgment of conviction or sentence, the district attorney in the county in which the conviction was obtained. NRS 34.730(2). Inadequate service is **not** a jurisdictional defect and therefore may be cured. *See Miles*, 120 Nev. 383, 91 P.3d 588.

5. FORM OF PETITION

The petition must be in *substantially* the form set forth in NRS 34.735 and be titled "Petition for Writ of Habeas Corpus (Postconviction)." NRS 34.730(2).

The petition must name as the respondent "the officer or other person by whom the petitioner is confined or restrained,"—e.g., the warden or head of the institution. NRS 34.730(2); *see also* NRS 34.735 (instructions in form petition). Nonetheless, petitions often name the State of Nevada as the respondent.

In reviewing a petition's technical compliance, the district court should keep in mind the Nevada Supreme Court's observation that the statutory provisions governing postconviction petitions do not preclude a petitioner "from curing technical defects by amendment." *Miles*, 120 Nev. at 385, 91 P.3d at 589.

6. POSTCONVICTION PETITION AS EXCLUSIVE REMEDY

a) General Rule

As a general rule, a postconviction petition for a writ of habeas corpus is the exclusive means of challenging the validity of a judgment of conviction or sentence and the computation of time served. NRS 34.724(2)(b), (c).

b) Exceptions

There are two exceptions to the general rule.

- The postconviction petition is not a substitute for and does not affect the remedy of a direct appeal. NRS 34.724(2)(a). A "direct appeal" is an appeal from a judgment of conviction.
- The postconviction petition "[i]s not a substitute for and does not affect any remedies which are incident to the proceedings in the trial court." *Id.*

c) Remedies Incident to Trial Court Proceedings

Only four remedies have been recognized by the Nevada Supreme Court as "incident to the proceedings in the trial court" and therefore are available remedies for seeking relief from a conviction or sentence. They are:

- ✓ Motions for modification of sentence. *Edwards v. State*, 112 Nev. 704, 918 P.2d 321 (1996).
- ✓ Motions to correct an illegal sentence. *Edwards v. State*, 112 Nev. 704, 918 P.2d 321 (1996).
- ✓ Motions to withdraw a guilty plea that are filed before sentencing. *See Harris v. State*, 130 Nev. 435, 447-48, 329 P.3d 619, 627-28 (2014).
- ✓ Motions for new trial based on newly discovered evidence. *Hart v. State*, 116 Nev. 558, 1 P.3d 969 (2000), *overruled on other grounds by Harris v. State*, 130 Nev. 435, 329 P.3d 619 (2014).

Another remedy that is likely incident to the trial court proceedings is a motion to set aside a death sentence based on mental retardation as provided in NRS 175.554.

The Nevada Supreme Court has held that a motion to withdraw a guilty plea pursuant to NRS 176.165 that is filed *after* sentencing *is not* incident to the proceedings in the trial court. *Harris v. State*, 130 Nev. 435, 447-48, 329 P.3d 619, 627-28 (2014) (overruling *Hart v. State*, 116 Nev. 558, 1 P.3d 969 (2000)). In response to *Harris*, the Nevada Legislature amended NRS 34.724 in 2017 to provide that a postsentencing motion to withdraw a plea is a remedy that is incident to the proceedings in the trial court if four conditions are satisfied. *See* NRS 34.724(3). See section II for a more in-depth discussion of motions to withdraw a guilty plea that are filed after sentencing.

7. NRCP APPLY IF CONSISTENT WITH NRS CH. 34

The Nevada Rules of Civil Procedure (NRCP) apply to postconviction habeas proceedings to the extent that the rules are not inconsistent with the statutes governing those proceedings. NRS 34.780(1). The Nevada Supreme Court has held that three rules of civil procedure, in particular, do not apply to postconviction habeas proceedings:

- ✓ NRCP 56, allowing for summary judgment, does not apply to a postconviction habeas petition. *Beets v. State*, 110 Nev. 339, 341, 871 P.2d 357, 358 (1994).
- ✓ The default provisions set forth in NRCP 55 do not apply to a postconviction habeas petition. *Means v. State*, 120 Nev. 1001, 1019, 103 P.3d 25, 37 (2004). Although the district court therefore cannot enter a default judgment as a sanction for the State's failure to timely respond to a petition, the district court may consider other sanctions for dilatory conduct, "including but not limited to the imposition of an attorney fee or other monetary sanctions, or in the most egregious cases, an order of confinement of the person at fault." *Id.* at 1020, 103 P.3d at 37-38.
- ✓ The rules regarding relation-back set forth in NRCP 15(c) do not apply to supplemental pleadings in a postconviction habeas proceeding. *State v. Powell*, 122 Nev. 751, 757-58, 138 P.3d 453, 457-58 (2006).

The district court may not dismiss a petition because the petitioner has not taken any action after filing the petition. The next action required after the filing of the petition is by the district court, as explained below.

8. EXPEDITIOUS JUDICIAL EXAMINATION

Whenever possible, a petition that challenges the validity of a conviction or sentence should be assigned to the judge or court that presided over the original criminal proceedings. NRS 34.730(3)(b). The clerk is required to "promptly" present the petition to a district judge. NRS 34.740.

The judge to whom the petition is assigned must "expeditiously" examine the petition. NRS 34.740. This must be done before a hearing on the petition may be set. NRS 34.730(4).

An expeditious judicial examination should include a review of the petition for the following:

- ✓ The nature of the petition—challenge to conviction or sentence, challenge to computation of time served, mixed. NRS 34.720; NRS 34.724; NRS 34.738.
- ✓ Whether the petition is properly filed by a person who has standing to file the petition. NRS 34.724(1).
- ✓ Whether the petition was filed in the correct court. NRS 34.738.

- ✓ Whether the petition has technical defects that can be corrected by an amendment. NRS 34.730; NRS 34.735; *Miles v. State*, 120 Nev. 383, 91 P.3d 588 (2004).
- ✓ Whether the petition was timely filed under NRS 34.726.
- ✓ Whether the petition is a second or successive petition under NRS 34.810(2) that may be summarily dismissed. NRS 34.745(4).
- ✓ Whether to order an answer or direct the prosecuting authority to take some other action. NRS 34.745.
- ✓ Whether to appoint counsel. NRS 34.750.

The initial examination under NRS 34.740 is not for purposes of determining the truth of any factual allegations, as the court cannot grant relief that discharges or changes the petitioner's custody unless an evidentiary hearing is held. NRS 34.770(1).

9. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The written order is the district court's opportunity to "present [its] position to the appellate court in the most effective way" and to alert the appellate court to unsettled issues that the district court observes from its position in the trial court. Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 Geo. L.J. 1283, 1291 (2008). The written order explains the thoughts behind the decision-making process and provides legitimacy to decisions with an "assurance that a given decision is not arbitrary." *Id.* at 1317.

a) Findings and Conclusions Required

The district court is required by NRS 34.830 to make specific findings of fact and conclusions of law when resolving a postconviction petition for a writ of habeas corpus. NRS 34.830(1) provides, "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." This requirement is echoed in NRAP 4(b)(5)(B).

b) Findings of Fact

An order resolving a petition should contain specific findings regarding the facts that are relevant to each claim raised in the petition. "A finding of fact is a fact that has been deduced from the evidence and found by the judge to be essential to an understanding of the case or to determine the rights of the parties." J.J. George, *Judicial Opinion Writing Handbook* 209 (2007).

The district court should take the opportunity to inform the appellate court of the bases for the findings of fact, which otherwise might not be apparent from a cold record. If there are special facts or inferences that the district court relied upon in resolving a claim, specific findings help eliminate appellate guesswork. *The Judge's Book* 233 (1994). In

particular, the order should include findings as to any disputed facts and any credibility determinations made by the court.

The benefit to making specific findings of fact is that a reviewing court will give deference to purely factual findings so long as they are supported by the record. *See, e.g.*, *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Making specific findings of fact therefore increases the chances that a decision will withstand appellate review.

c) Conclusions of Law

An order resolving a petition should contain specific conclusions of law for each claim raised in the petition. "The conclusion of law should not be a mere recitation of general legal precepts." J.J. George, *Judicial Opinion Writing Handbook* 239 (2007). Thus, while it is appropriate to include statements of the applicable law in the order, a conclusion of law should *apply* the relevant law to the facts, as found by the court, to reach a conclusion as to the legal issue presented by each claim. *Id.* ("The conclusion of law should state how the applicable legal precept is specifically applied to the facts of the case and the issue raised."). The order should state the specific grounds for denying each claim.

For example, with respect to an ineffective-assistance claim, the conclusions of law would evaluate the relevant facts in light of the *Strickland* test, *see* section I.B.11, to determine the legal questions of whether the petitioner demonstrated that counsel's performance was deficient and that the petitioner was prejudiced as a result. Resolving the claim may therefore require several conclusions of law.

Although a reviewing court generally will conduct an independent review of the legal conclusions, *see, e.g.*, *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994), it is important for the district court to explain its conclusions of law. This is the district court's opportunity to explain its reasoning to the parties and the public and to inform the appellate court of the reasoning underlying the decision.

d) Resolve All Claims

The district court's final order, unless prior intermediate orders have been entered, must resolve all claims that were raised in the petition and any supplemental documents that the petitioner has been permitted to file. An order is not final until all claims raised in the proceedings have been resolved. Thus, if the district court denies some claims summarily, but determines that an evidentiary hearing is warranted on other claims, an order entered to that effect is not the final order.

e) Order Prepared by Prevailing Party

The district court "may request a party to submit proposed findings of facts and conclusions of law." NCJC Canon 3B(7) cmt. There are special requirements that must be met if the district court chooses to have a party draft a proposed order resolving a postconviction habeas petition:

1. The court 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*, 123 Nev. 67, 69, 156 P.3d 691, 692 (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.; *see also* NCJC Canon 3B(7) (requiring the district court to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard"); *Byford*, 123 Nev. at 69-70, 156 P.3d at 692.

3. Finally, the court must ensure that the proposed order drafted by the prevailing party accurately reflects the district court's findings and conclusions. *See Byford*, 123 Nev. at 69, 156 P.3d at 692.

There are two special problems that the district court should be aware of in having a prevailing party prepare a written order.

- First, it may be difficult to enter a written order within 20 days from the date of oral pronouncement, as required by NRAP 4(b)(5)(B), if the order is prepared by the prevailing party because of the time it may take to allow the other party an opportunity to review and respond to the proposed order. The court should set regular status checks to ensure that the order is prepared as expeditiously as possible.
- Second, if the losing party is not represented by counsel and is incarcerated, the requirement that he or she be given an opportunity to review and respond to the proposed order may present additional challenges. Although *Byford* did not involve a pro se petitioner and the Nevada Supreme Court has not expressly stated that the requirements in *Byford* apply when the petitioner is not represented by counsel, the district court may want to exercise caution nonetheless as the language used in *Byford* and in the commentary to NCJC Canon 3B(7)—"other parties"—is broad.

f) Time Limit for Entering Written Order

The district court must enter a written order resolving a postconviction habeas petition within 20 days after the oral pronouncement of the final decision. NRAP 4(b)(5)(B). When a district court plans to draft its own order, the court should carefully consider whether to make an oral pronouncement of its decision. An oral pronouncement triggers the deadlines in NRAP 4(b). Also, the losing party may file a notice of appeal following an oral pronouncement. In that situation, the Nevada Supreme Court will order the district court to enter a written order within a specified period of time if one has not already been entered. But regardless of whether the court orally pronounces its decision, it should ensure that a petition is resolved expeditiously.

g) Notice of Entry

The district court clerk is required to serve a copy of a district court order discharging the petitioner from custody, committing the petitioner to the custody of another person, dismissing the petition, or denying the requested relief. The notice of entry must be served on the following people:

- ✓ The petitioner.
- ✓ The petitioner's counsel, if any.
- ✓ The respondent.
- ✓ The Attorney General.
- ✓ The district attorney of the county in which the petitioner was convicted.

NRS 34.830(2).

The time limit for filing a notice of appeal from the district court's order does not begin to run until the written notice of entry is properly served by the district court clerk. *See* NRS 34.575(1). Any deficiency in the notice of entry will give the aggrieved party additional time to file a notice of appeal. For example, because NRS 34.830(2) requires that the notice of entry be served by the district court clerk, service by the Attorney General or district attorney is ineffective and does not start the time limit for filing a notice of appeal. Similarly, the petitioner and the petitioner's counsel, if any, must both be served individually with notice of entry of the order; a notice of entry that is not properly served on both does not start the time limit for filing a notice of appeal. *See Klein v. Warden*, 118 Nev. 305, 309, 43 P.3d 1029, 1032 (2002); *Lemmond v. State*, 114 Nev. 219, 954 P.2d 1179 (1998).

B. CHALLENGE TO CONVICTION OR SENTENCE

1. INTRODUCTION

The postconviction petition for a writ of habeas corpus is the standard means, other than a direct appeal, of challenging a conviction or sentence in a criminal case. This section addresses the processing of these petitions.

2. JURISDICTION: WHERE IS THE PETITION FILED?

A petition that challenges the legality of a judgment of conviction or sentence must be filed in the district court for the **county in which the conviction occurred**. NRS 34.738(1). If the petition is filed in the wrong county, the district court should order the clerk to transfer the petition to the appropriate county. NRS 34.738(2)(b).

3. STANDING

The petitioner's standing to file the petition may impact the district court's handling of the petition.

The Nevada Constitution gives the district courts the power to issue writs of habeas corpus "on petition by . . . any person . . . who *has suffered a criminal conviction* in their respective districts and *has not completed the sentence imposed pursuant to the judgment of conviction*." Nev. Const. art. 6, § 6(1) (emphases added). Similarly, NRS 34.724(1) limits a postconviction habeas petition challenging a judgment of conviction or sentence to those individuals who

- ✓ have been convicted of a crime, and
- ✓ are under sentence of death or imprisonment.

Based on these provisions, the district court must dismiss a petition that challenges the validity of a judgment of conviction if the petitioner completed the sentence for the challenged conviction *before filing* the petition. *Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999); *see also Coleman v. State*, 130 Nev. 190, 195, 321 P.3d 863, 867 (2014) (holding that "a person who is subject only to lifetime supervision is not under a sentence of imprisonment within the meaning of NRS 34.724(1) and therefore cannot file a post-conviction petition for a writ of habeas corpus to challenge his sentence"). If the petitioner is released from custody or discharged from probation or parole *after filing* a petition that challenges the validity of a judgment of conviction, the petition does not become moot if there are collateral consequences stemming from the conviction. *Martinez-Hernandez v. State*, 132 Nev. 623, 380 P.3d 861 (2016). The Nevada Supreme Court has held "that there is a presumption that continuing collateral consequences exist whenever there is a criminal conviction." *Id.* at 628, 380 P.3d at 865.

4. RESPONSE OR ANSWER TO PETITION

The State is not required to respond to a petition until the district court orders it to do so. And in many instances, despite a certificate of service attached to a petition, the State may not have been served and may be unaware that the petition is pending until it receives an order directing it to file an answer.

If the petition challenges a judgment of conviction or sentence and is the petitioner's first such petition, the district court "shall" order the **prosecuting authority** that obtained the conviction (usually the district attorney but sometimes the attorney general) to file a response or answer or may order the prosecuting authority to "[t]ake other action that the judge . . . deems appropriate." NRS 34.745(1)(a)(1), (b).

The statute allows for a response "within 45 days or a longer period fixed by the judge." NRS 34.745(1)(a).

The order directing a response or answer must be in "substantially" the form provided in NRS 34.745(3) and must be served on the petitioner or his counsel, the respondent, the Attorney General, and the district attorney of the county in which the petitioner was convicted. Although the form order is directed to the respondent, if the petition properly names the confining authority as the respondent, *see* NRS 34.730(2), then the order for a response or answer should be directed to the prosecuting authority consistent with NRS 34.745(1)(a).

5. RETURN

The return provides basic information about the petitioner's custody status. *See* NRS 34.430.

NRS 34.745(1)(a)(2) provides that the district court must order the **prosecuting authority** (usually the district attorney but sometimes the attorney general) to file a return if the petition challenges a conviction or sentence and an evidentiary hearing is required under NRS 34.770.

The statute allows for a return to be filed "within 45 days or a longer period fixed by the judge." NRS 34.745(1)(a). The order directing a return must be in "substantially" the form provided in NRS 34.745(3) and must be served on the petitioner or his counsel, the respondent, the Attorney General, and the district attorney of the county in which the petitioner was convicted.

6. SUMMARY DISMISSAL OF SECOND OR SUCCESSIVE PETITIONS

The district court may "enter an order for [the] summary dismissal" of a second or successive petition when it "plainly appears from the face of the petition or an amended petition and documents and exhibits that are annexed to it, or from records of the court" that the petition is procedurally barred under NRS 34.810(2). NRS 34.745(4). As the statutory language states, the court may "look beyond the face of a petition to the courts' own records in deciding whether to order summary dismissal of the petition." *State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003).

When the district court summarily dismisses a second or successive petition under NRS 34.745(4), the court must enter a written order. See section I.A.9 for a discussion of written orders.

7. APPOINTMENT OF COUNSEL

There is no federal or state constitutional right to counsel in state postconviction proceedings. *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality opinion); *accord Rippo v. State*, 134 Nev., Adv. Op. 53, 423 P.3d 1084, 1097 (2018); *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997); *McKague v. Warden*, 112 Nev. 159, 912 P.2d 255 (1996); *see also Martinez v. Ryan*, 566 U.S. 1, 8-9

(2012) (declining to recognize constitutional right to counsel in initial state postconviction proceedings but holding that where postconviction proceeding is first opportunity to challenge effectiveness of trial counsel, ineffective assistance of postconviction counsel may provide good cause to excuse procedural default as to a federal habeas petition and absence of counsel in initial state postconviction proceeding will preclude State from relying on procedural default to bar a federal habeas petition).

The district court is **required** by statute to appoint postconviction counsel in only one situation: when the petitioner is under a death sentence and the petition is the first petition challenging the validity of the conviction or sentence. NRS 34.820(1).

In all other situations, the district court has **discretion** to appoint postconviction counsel if "the court is satisfied" that (1) the petitioner is indigent and (2) the petition is not dismissed summarily. NRS 34.750(1). In exercising its discretion, the court may consider many factors, including the following non-exhaustive list set forth in NRS 34.750(1):

- the severity of the consequences facing the petitioner
- the difficulty of the issues presented
- whether the petitioner is unable to comprehend the proceedings
- whether counsel is necessary to proceed with discovery.

See Renteria-Novoa v. State, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). The Nevada Supreme Court has indicated that the district court should consider whether any alleged language barriers suggest that the petitioner is unable to comprehend the proceedings. *Id.* The court also has explained that the district court's "decision whether to appoint counsel under NRS 34.750(1) is not necessarily dependent upon whether a pro se petitioner has raised claims that clearly have merit or would warrant an evidentiary hearing." *Id.* at 77, 391 P.3d at 762. For example, "where a language barrier may have interfered with the petitioner's ability to comprehend the proceedings, the petitioner may be unable to sufficiently present viable claims in his or her petition without the assistance of counsel." *Id.*

When a petitioner is **indigent**, all costs—including reasonable compensation for appointed postconviction counsel—are paid from money appropriated to the State Public Defender's Office for that purpose. When that appropriation to the State Public Defender's Office is exhausted, additional money is allocated to that office from the Reserve for Statutory Contingency Account. NRS 34.750(2). Thus, the county is not required to bear the costs of compensating appointed postconviction counsel.

8. SUPPLEMENTAL PLEADINGS

After the district court appoints postconviction counsel, that counsel may file supplemental pleadings. NRS 34.750(3).

NRS 34.750(3) provides that counsel may file and serve supplemental pleadings within 30 days after the date the court orders the filing of an answer or return, or the date of counsel's appointment, whichever is later. While the district court may

choose to grant counsel additional time to supplement the petition, the district court should set firm deadlines to ensure the timely prosecution of a petition. NCJC 2.5 Comment 4 ("In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.").
The district court also has broad discretion to order supplemental pleadings. For example, the court may order supplemental pleadings to cure a technical defect in the petition. *See Miles v. State*, 120 Nev. 383, 91 P.3d 588 (2004); NRS 34.750(5). A supplemental petition relates back to the filing date of the original petition. *State v. Powell*, 122 Nev. 751, 757-58, 138 P.3d 453, 457-58 (2006). The district court may decline to allow additional pro se pleadings, *see* NRS 34.750(5), but if the district court declines to consider a document filed by the district court clerk, the district court should take the appropriate action in striking the document or explicitly set forth the documents considered in the final order resolving the petition.

A petitioner is permitted to file a response to a motion to dismiss the petition. *See* NRS 34.750(4). The response is required to be filed within 15 days after service of the motion to dismiss. This necessarily requires the district court to wait to resolve a petition and the motion to dismiss until after this period has expired.

9. PROCEDURAL BARS

a) Introduction

A postconviction habeas petition that challenges a judgment of conviction or sentence may be subject to several statutory procedural bars that preclude a determination on the merits of the petitioner's claims. The procedural bars limit the time in which a petition may be filed, the scope of petitions challenging a conviction based on a guilty plea, claims that could have been raised in a prior proceeding, and the number of petitions that may be filed.

The Nevada Supreme Court has held that the statutory procedural bars are mandatory, and a district court therefore lacks discretion to ignore them. *State v. Dist. Ct. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005); *see also Pellegrini v. State*, 117 Nev. 860, 886 & n.116, 34 P.3d 519, 536 & n.116 (2001). If a district court ignores a clearly applicable procedural bar, the Nevada Supreme Court may entertain an original writ petition and direct the district court to consider and apply the procedural bars. *Riker*, 121 Nev. at 233, 112 P.3d at 1075-76.

When the district court dismisses a claim or petition based on a procedural bar, the written order should identify the specific procedural bar(s) applied. And if the court addresses the merits of the barred claims to determine whether the petitioner can demonstrate prejudice, the written order should make that clear. If the court fails to do so, a federal court may address the merits of the claim on federal habeas review. *Harris v. Reed*, 489 U.S. 255, 263 (1989).

b) Time Limits: One Year and Laches

The passage of time operates as a bar to the right to pursue a claim in a postconviction habeas petition. Nevada has two statutory provisions that address time limits on the filing of a postconviction habeas petition that challenges a judgment of conviction or sentence.

(1) One-Year Time Limit (NRS 34.726)

A petition that challenges a conviction or sentence must be filed within 1 year after entry of the judgment of conviction or, if a timely appeal was taken from the judgment of conviction, within 1 year after the appellate court issues its remittitur. NRS 34.726(1). All petitions must be timely filed, including second or successive petitions. *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 529 (2001).

A petition may be filed while a direct appeal is pending—the only thing that the statute requires as a predicate to filing a postconviction habeas petition is a judgment of conviction. *See* NRS 34.724(1) (providing that "[a]ny person convicted of a crime and under sentence of death or imprisonment" may file a postconviction habeas petition "to obtain relief from the conviction or sentence"); *Sheriff v. Hatch*, 100 Nev. 664, 666, 691 P.2d 449, 450 (1984) (explaining that petition for a writ of habeas corpus is "a form of collateral attack—an independent proceeding instituted for the purpose of testing the legality of detention"). The court may resolve the petition or stay the proceedings pending resolution of the direct appeal.

When first reviewing a petition under NRS 34.740, the district court should determine whether the petition was timely filed. If the petitioner used the form petition, the answers to the following questions should assist the court in determining whether the petition was timely filed:

- ✓ Question 3 (date of judgment of conviction)
- ✓ Question 12 (whether petitioner appealed from judgment of conviction)
- ✓ Question 13 (information about any appeal)
- ✓ Question 19 (whether petition was untimely and reasons for filing untimely petition)

See NRS 34.735. The district court should also look to its records in determining whether the petition was timely filed.

There are several considerations to keep in mind that affect the computation of the 1-year period.

- ✓ The prison mailbox rule (document is timely filed when received by prison official for mailing) does not apply. The petition must be filed with the district court clerk before the time period expires. *Gonzales v. State*, 118 Nev. 590, 595, 53 P.3d 901, 903-04 (2002). Although the prison mailbox rule does not apply to the filing of a postconviction petition, official interference that prevented the inmate from timely mailing or filing the petition may provide cause to excuse the untimely filing.

Id. For example, if the district court clerk receives the petition before the time limit runs but does not file it until after the 1-year period has passed, that may constitute official interference.

- ✓ The 1-year period begins to run from the entry of the judgment of conviction unless the petitioner filed a *timely* direct appeal. *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). If the petitioner did not timely file a notice of appeal from the judgment of conviction, the 1-year period begins to run from the date that the judgment of conviction was entered.
- ✓ If the petitioner timely filed a direct appeal, the 1-year period runs from the date that the appellate court issues its remittitur, not the date that the district court receives it. *Gonzales*, 118 Nev. at 593, 53 P.3d at 902.
- ✓ If the petitioner voluntarily dismissed a timely direct appeal, the 1-year period for filing a petition begins to run upon entry of the appellate court's order granting the voluntary dismissal because the appellate court does not issue a remittitur following a voluntary dismissal. *Id.* at 596 n.18, 53 P.3d at 904 n.18.
- ✓ If the petitioner was allowed to file an untimely direct appeal pursuant to NRAP 4(c) (effective July 1, 2009), the 1-year period for filing a petition begins to run from the date that the appellate court issues its remittitur in the untimely direct appeal. NRAP 4(c)(4) (effective July 1, 2009).
- ✓ A supplemental petition relates back to the date of filing of the original petition for purposes of NRS 34.726. *State v. Powell*, 122 Nev. 751, 757-58, 138 P.3d 453, 457-58 (2006).
- ✓ In computing the time period, the date the judgment is entered or the remittitur is issued shall not be included and if the last day falls on a Saturday, Sunday, or a nonjudicial day, the 1-year period runs until the end of the next judicial day. *See* NRS 178.472; *see also Gonzales*, 118 Nev. at 593 n.7, 53 P.3d at 903 n.7.

The district court **must dismiss** an untimely petition under NRS 34.726 **unless the petitioner shows good cause for the delay**. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory."). Good cause exists if the petitioner demonstrates

- ✓ To the court's "satisfaction," that the delay was not the petitioner's fault and dismissal of the petition as untimely would unduly prejudice the petitioner, NRS 34.726(1), or
- ✓ That failure to consider the claims would result in a fundamental miscarriage of justice, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

In evaluating the cause for a delay, the district court should keep in mind that all claims reasonably available must be made within the 1-year period. *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). The cause, prejudice, and fundamental miscarriage of justice standards are addressed in further detail in section I.B.9.f.

If the petitioner used the form petition, the answer to Question 19 (reasons for filing untimely petition) should assist the court in determining whether the petitioner has demonstrated good cause for the delay. *See* NRS 34.735. If the form was not used, the court should read the entire petition for any relevant argument about why the petition is late.

(2) Laches (NRS 34.800)

A petition may 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).

- ✓ The petition may be dismissed if delay in filing it prejudices the State in responding to the petition, unless
  - "the petitioner shows that the petition is 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).
- ✓ The petition may be dismissed if delay in filing it prejudices the State in its ability to retry the petitioner, 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).

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 judgment of conviction, an order imposing a sentence of imprisonment, or a decision on direct appeal from a judgment of conviction. NRS 34.800(2). If the petitioner was authorized to file an untimely direct appeal pursuant to NRAP 4(c), the 5-year period begins to run from the decision in that appeal. NRAP 4(c)(4) (effective July 1, 2009).

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.* Generally, the petitioner must respond to a motion to dismiss within 15 days after service of the motion. NRS 34.750(4).

c) Limit on Challenges to Guilty Plea (NRS 34.810(1)(a))

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

- ✓ was involuntarily or unknowingly entered or
- ✓ was entered without effective assistance of counsel.

NRS 34.810(1)(a).

d) Waiver (NRS 34.810(1)(b))

A petition that challenges a conviction based on a jury verdict is limited to claims that could not have been raised in a prior proceeding, such as at trial, on direct appeal, or in a prior postconviction petition. NRS 34.810(1)(b). Claims that could have been considered in a prior proceeding are waived.

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

- cause for the procedural default and actual prejudice to the petitioner, NRS 34.810(1)(b), or
- that failure to consider the claims would result in a fundamental miscarriage of justice, *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537.

The petitioner has the burden of **pleading and proving** specific facts to demonstrate good cause and prejudice. NRS 34.810(3); *see also State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). The cause, prejudice, and fundamental miscarriage of justice standards are addressed in further detail in section I.B.9.f.

e) Second or Successive Petitions (NRS 34.810(2))

If the petitioner previously has filed a postconviction petition, the court must dismiss a second or successive petition when

- ✓ the petition fails to allege new or different grounds for relief and the prior determination on the claims was on the merits, *or*
- ✓ 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). If the petitioner was authorized to file an untimely direct appeal pursuant to NRAP 4(c), a postconviction habeas petition filed after resolution of that appeal is not a second or successive petition for purposes of NRS 34.810(2). NRAP 4(c)(4) (effective July 1, 2009).

If the petitioner used the form petition, the answers to the following questions should assist the district court in determining whether the petition is a second or successive petition:

- ✓ Question 15 (whether petitioner has filed any petitions, applications, or motions challenging judgment in any court)
- ✓ Question 16 (information about any petitions, applications, or motions challenging judgment in any court)
- ✓ Question 17 (whether any claims being raised have been raised previously)
- ✓ Question 18 (whether and why any claims were not raised in prior proceedings)

See NRS 34.735. The district court should also look to its record in making this determination. *See* NRS 34.745(4).

The district court **may excuse the procedural bar** against second or successive petitions if it finds

- good cause for the petitioner's failure to present the claim or for presenting the claim again *and* actual prejudice to the petitioner, NRS 34.810(3), or
- that failure to consider the petition would result in a fundamental miscarriage of justice, *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537.

The statute specifically provides that the 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, 181, 69 P.3d 676, 681 (2003). 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, 879-80, 901 P.2d 123, 127 (1995). The cause, prejudice, and fundamental miscarriage of justice standards are addressed in further detail in section I.B.9.f.

If the petitioner used the form petition, the answers to the following questions should assist the court in determining whether the petitioner has pleaded specific facts to demonstrate good cause or has asserted that failure to consider the petition will result in a fundamental miscarriage of justice:

- ✓ Question 17(c) (why any claims are being raised again)
- ✓ Question 18 (whether and why any claims were not raised in prior proceedings)

See NRS 34.735. If the petitioner did not use the form, the court should review the petition and any supporting documents submitted with it to determine whether the petitioner has met the requirements for pleading good cause or a fundamental miscarriage of justice. *See* NRS 34.745(4).

f) Excusing the Procedural Bars (Good Cause, Prejudice, and Fundamental Miscarriage of Justice)

As explained above 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) may be overcome by a showing of good cause and prejudice or a fundamental miscarriage of justice. 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.*, *Rippo v. State*, 134 Nev., Adv. Op. 53, 423 P.3d 1084, 1097 (2018); *Pellegrini*, 117 Nev. at 886-87, 34 P.3d at 537.

(1) Good Cause

To show good cause to overcome these procedural bars, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with the procedural requirements—e.g., filing a timely petition, raising a claim in a prior proceeding, or raising a claim again. *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 232, 112 P.3d 1070, 1074-75 (2005); *Pellegrini*, 117 Nev. at 886, 34 P.3d at 537.

Examples of good cause:

- The factual basis for a claim was not reasonably available to be raised in a timely petition or prior proceeding. *Pellegrini*, 117 Nev. at 886-87, 34 P.3d at 537. The claim must be raised within a reasonable time after it became available. *Rippo v. State*, 134 Nev., Adv. Op. 53, 423 P.3d 1084, 1095-96 (2018); *Hathaway v. State*, 119 Nev. 248, 253-55, 71 P.3d 503, 506-08 (2003).
- The legal basis for a claim was not reasonably available to be raised in a timely petition or prior proceeding. *Pellegrini*, 117 Nev. at 886-87, 34 P.3d at 537. The claim must be raised within a reasonable time after it became available. *Rippo*, 134 Nev., Adv. Op. 53, 423 P.3d at 1095-96; *Hathaway*, 119 Nev. at 253-55, 71 P.3d at 506-08.
- Official interference made compliance with the procedural requirement impracticable. *Pellegrini*, 117 Nev. at 886-87, 34 P.3d at 537.
- An appeal-deprivation claim may provide good cause to excuse the delay in filing a postconviction petition 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*, 119 Nev. 248, 254, 71 P.3d 503, 507-08 (2003).
- When the appointment of postconviction counsel is statutorily mandated, the ineffective assistance of postconviction counsel may provide good cause for filing a successive petition. *Rippo v. State*, 134 Nev., Adv. Op. 53, 423 P.3d 1084 (2018); *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997); *McKague v. Warden*, 112 Nev. 159, 912 P.2d 255 (1996). The United States Supreme Court has declined to recognize a constitutional right to postconviction counsel, but it has determined that when a state postconviction proceeding is the first opportunity to challenge the effectiveness of trial counsel, ineffective assistance of state postconviction counsel may equitably excuse a federal procedural default (the adequate-state-ground bar) in litigating a petition in federal court and likewise the failure to appoint postconviction counsel in the state proceeding will preclude the State from arguing a procedural bar (the adequate-state-ground bar) in federal court. *Martinez v. Ryan*, 566 U.S. 1, 8-9, 14 (2012). The Nevada Supreme Court has held that the equitable exception to the federal procedural default recognized in *Martinez* does not apply to the state procedural defaults where the appointment

of postconviction counsel is not statutorily mandated. *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014).

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

- Trial counsel's failure to send a petitioner his or her file. *Hood v. State*, 111 Nev. 335, 890 P.2d 797 (1995).
- The petitioner's limited intelligence and reliance on an unschooled inmate law clerk for assistance. *Phelps v. Director, Prisons*, 104 Nev. 656, 764 P.2d 1303 (1988).
- The petitioner's pursuit of habeas corpus relief in federal court. *Colley v. State*, 105 Nev. 235, 773 P.2d 1229 (1989).
- Claims, such as ineffective assistance of trial or appellate counsel, that are themselves procedurally barred. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506; *Harris v. Warden*, 114 Nev. 956, 964 P.2d 785 (1998), *clarified by Hathaway*, 119 Nev. 248, 71 P.3d 503.

(2) Prejudice

To show actual prejudice, a 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*, 121 Nev. at 232, 112 P.3d at 1075 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)); *see also Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

(3) Fundamental Miscarriage of Justice

When a petitioner cannot demonstrate good cause, the district court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015); *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. The fundamental-miscarriage-of-justice standard can be met with "a colorable showing" that the petitioner is "actually innocent of the crime or is ineligible for the death penalty." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537.

Actual innocence thus provides a gateway through which a petitioner may obtain review of the merits of an otherwise procedurally barred claim. The Nevada case law addressing the actual-innocence gateway to considering the merits of an otherwise procedurally barred claim is based on federal case law. The Nevada Supreme Court has acknowledged that under the federal cases only procedurally barred *constitutional* claims may be considered on the merits if the petitioner satisfies the actual-innocence gateway. *See Berry*, 131 Nev. at 966 n.2, 363 P.3d at 1154 n.2. The limitation in the federal cases stems from the fact that state inmates may only raise constitutional claims in a federal habeas petition. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (explaining that federal habeas review of state convictions "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States" and does not include

errors of state law). In contrast, NRS 34.724 allows state habeas petitioners to assert non-constitutional claims as well as constitutional claims. The Nevada Supreme Court has not determined whether a state petitioner "who passes through the . . . actual innocence gateway, may have his procedurally defaulted *non-constitutional* claims heard on the merits." *Berry*, 131 Nev. at 966 n.2, 363 P.3d at 1154 n.2.

When the petitioner alleges that he is actually innocent of the crime, he must show that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). When the petitioner alleges that he is actually innocent of the death penalty, the focus is on the aggravating circumstances. *Lisle v. State*, 131 Nev. 356, 362-68, 351 P.3d 725, 730-34 (2015). In that context, the petitioner must show that it is more likely than not that no reasonable juror would have found the aggravating circumstance(s) in light of new evidence or that the aggravating circumstance(s) is invalid as a matter of law. *Lisle*, 131 Nev. at 362, 351 P.3d at 730.

10. EVIDENTIARY HEARINGS

a) Introduction

After reviewing the petition, return and answer, and all supporting documents, the district court should determine whether an evidentiary hearing is required. NRS 34.770(1). An evidentiary hearing may be required on the substantive claims, good cause to overcome a procedural bar, or an actual-innocence gateway claim.

The district court may not grant a new trial or a new sentencing hearing, or otherwise discharge a petitioner, without conducting an evidentiary hearing. NRS 34.770(1) ("A petitioner must not be discharged or committed to the custody of a person other than the respondent [the warden] unless an evidentiary hearing is held.").

b) When to Grant an Evidentiary Hearing

An evidentiary hearing is required if:

- ✓ The claims are supported by specific factual allegations.
- ✓ The factual allegations are not belied by the record.
- ✓ The factual allegations, if true, would entitle the petitioner to relief.

Berry v. State, 131 Nev. 957, 967, 363 P.3d 1148, 1154-57 (2015) (actual-innocence gateway claim); *Hathaway v. State*, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003) (good cause); *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (substantive claims); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (substantive claims).

The first two requirements—specific factual allegations that are not belied by the record—go to the **factual underpinnings** of the claims.

- First, an evidentiary hearing is not required if the claims are not supported by specific factual allegations. "Bare," "naked," or conclusory claims are not sufficient. *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984).
- Second, an evidentiary hearing is not required if the claims are belied by the record. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). Thus, the district court cannot rely on affidavits submitted with a response or answer in determining whether the factual allegations are belied by the record. *Id.* at 354-56, 46 P.3d at 1230-31. As a general matter, the district court should not make credibility determinations without an evidentiary hearing. *See id.* at 356, 46 P.3d at 1231 (rejecting suggestion that district court can resolve factual dispute without an evidentiary hearing and noting that "by observing the witnesses' demeanors during an evidentiary hearing, the district court will be better able to judge credibility"). But when the question is whether to conduct an evidentiary hearing with respect to an actual-innocence gateway claim, the court "may make some credibility determinations based on the new evidence," namely in the context of determining "how reasonable jurors would react to the overall record" including the new evidence. *Berry v. State*, 131 Nev. 957, 968-69, 363 P.3d 1148, 1155-56 (2015).

The last requirement—that the factual allegations, if true, would entitle the petitioner to relief—goes to the **legal underpinnings** of the claims. For purposes of this requirement, the district court must accept as true the factual allegations in the petition. *See Berry v. State*, 131 Nev. 957, 968, 363 P.3d 1148, 1155 (2015) (explaining that when deciding whether to conduct an evidentiary hearing on an actual-innocence gateway claim, "the district court must assume the new evidence is true"). Thus, the district court should ask the following question: Assuming that the facts are as the petitioner states, would the application of the law to those facts require relief? If the answer is no, an evidentiary hearing is not required. If the answer is yes, an evidentiary hearing is required.

If the court has any doubt about whether to grant an evidentiary hearing, it should err in favor of granting a hearing. Although it may save some time to deny a hearing, doing so may serve to delay resolution of the case for two reasons.

- Error in failing to grant an evidentiary hearing likely will not be considered harmless by a reviewing court, *see Mann*, 118 Nev. at 356, 46 P.3d at 1231, requiring the district court to conduct further proceedings on remand.
- Denying a hearing in questionable circumstances gives the petitioner an opportunity to obtain an evidentiary hearing in federal court on the ground that he was denied a full and fair hearing in state court. If the federal court agrees, then the state court's denial of a hearing only served to delay resolution of the case.

If the district court determines an evidentiary hearing is not required, the judge shall deny the petition without an evidentiary hearing. NRS 34.770(2). The district court may, however, place the petition on calendar for the purpose of stating its reasons for denying the petition and directing the preparation of a written order in compliance with its reasons.

c) Granting Writ and Scheduling the Hearing

When the district court determines that an evidentiary hearing is required, it shall grant the writ and schedule a date for the hearing. NRS 34.770(3). Granting the writ "does not entitle a petitioner to be discharged from the custody or restraint under which he is held," but instead "requires only the production of the petitioner to determine the legality of his custody or restraint." NRS 34.390(2); *see also Gebers v. State*, 118 Nev. 500, 503, 50 P.3d 1092, 1094 (2002). The writ therefore "must be directed to the person who has the petitioner in custody" and "command[ ] him to have the body of the petitioner produced before the district court . . . at a time which the judge . . . directs." NRS 34.400.

As a practical matter, some courts have the state prepare a transport order to obtain the petitioner's presence for the evidentiary hearing rather than granting the writ.

When the district court grants an evidentiary hearing, it may limit the scope of the hearing to the specific claims that warrant the hearing. The district court may do so in the order granting the writ and scheduling the evidentiary hearing. In that order, the district court also may resolve with specific findings of fact and conclusions of law the remaining claims raised in the petition that did not require an evidentiary hearing. Alternatively, the district court may wait to resolve the remaining claims in the final order disposing of the petition.

When the district court grants an evidentiary hearing, it should schedule the hearing for at least 30 days after entry of the order. The court should keep in mind that there needs to be sufficient time for the petitioner to receive notice of the hearing, have time to prepare for the hearing, and be transported. Allowing sufficient time should avoid later arguments that the petitioner was deprived of due process.

d) Discovery Allowed If Evidentiary Hearing Granted

After granting the writ and setting a date for an evidentiary hearing, the district court may grant leave for a party to "invoke any method of discovery available under the Nevada Rules of Civil Procedure" upon a showing of "good cause." NRS 34.780(2). The request for discovery must be accompanied by a statement of the interrogatories or requests for admission and a list of any documents sought. NRS 34.780(3).

e) Appointing Counsel When an Evidentiary Hearing Is Granted

As discussed in section I.B.7, with the exception of a timely first petition filed by an inmate under a death sentence, the district court has **discretion** to appoint counsel to assist a petitioner in the postconviction proceedings. *See* NRS 34.750; NRS 34.820. The district

court may, however, find that when an evidentiary hearing is required, the appointment of counsel may provide a more meaningful hearing:

- An attorney will have greater access to the case file and necessary documents. In contrast, a self-represented petitioner may not be permitted to bring his belongings—including his petitions and paperwork—when he is transported from the facility where he is incarcerated.
- An attorney may be able to focus the hearing and will be better able to stay within any limits that the district court has placed on the claims to be addressed at the hearing. In contrast, a self-represented petitioner may stray from the district court's determination of the scope of the petition, which may cause confusion or waste the court's limited time.
- An attorney will be in a better position to investigate the claims and request and conduct discovery. In contrast, a self-represented petitioner may not be able to fully support his claims through discovery, etc. as the result of his custody status.

f) Petitioner's Presence Required for Evidentiary Hearing

The provisions of NRS chapter 34 **require** the petitioner's presence at an evidentiary hearing conducted on the merits of the petition. *Gebers*, 118 Nev. at 504, 50 P.3d at 1094 (discussing NRS 34.390 (granting and effect of writ), NRS 34.400 (content of writ), and NRS 34.770 (determination of need for evidentiary hearing)). Any argument or factual presentation requires the petitioner's presence.

The petitioner's presence is not required if the district court is merely announcing its decision on the petition. However, as discussed in section I.A.9, the district court must enter a written order for its decision to be final.

Additionally, although the Nevada Supreme Court has not addressed the issue, the petitioner may be able to waive his or her presence so long as the waiver is knowingly and voluntarily entered. If the court allows a waiver, the waiver should be explicit and in writing or made on the record.

g) Record May Be Expanded If Evidentiary Hearing Granted

If an evidentiary hearing is required, the district court may direct that the record be expanded by the parties to include additional materials that are relevant to the determination of the petition's merits. NRS 34.790(1). The expanded record may include letters, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be considered as part of the expanded record. NRS 34.790(2). Any documents submitted to expand the record "must be submitted to the party against whom they are to be offered, and [that party] must be afforded an opportunity to admit or deny their correctness." NRS 34.790(3).

The district court must require the authentication of any documents submitted to expand the record. NRS 34.790(4). Authentication is particularly important in evaluating

documents submitted by a pro se petitioner. And because authentication may be beyond the ken of many pro se petitioners, this presents another reason to appoint counsel if an evidentiary hearing is required.

h) Conducting an Evidentiary Hearing

A postconviction evidentiary hearing is similar to any other evidentiary hearing in a criminal case. The petitioner is entitled to present evidence on the issues that are the subject of the hearing and the State is entitled to present evidence in response. The district court judge acts as the trier of fact, resolving conflicts in the evidence, making credibility determinations, and determining the weight to be given to the testimony and evidence.

Because an evidentiary hearing is required when there are specific factual allegations that are not contradicted by the record and that, if true, would entitle the petitioner to relief, the hearing may require a comprehensive presentation of testimony and evidence to prove the factual allegations in the petition. For example, if the petitioner raises an ineffective-assistance claim based on trial counsel's failure to present expert testimony and the court determines that an evidentiary hearing is warranted, the hearing likely will require testimony from trial counsel and the expert(s) that the petitioner claims should have been presented at trial so that the district court can determine whether the petitioner has met his burden of proving that counsel's performance was deficient and that he was prejudiced as a result of the deficient performance. A claim of ineffective assistance of counsel operates to waive the attorney-client privilege for that proceeding. NRS 34.735; *Molina v. State*, 120 Nev. 185, 193-94, 87 P.3d 533, 539 (2004).

i) Discretion to Consider New Claims at Evidentiary Hearing

The district court has discretion to allow a petitioner to raise new claims at the evidentiary hearing. *Barnhart v. State*, 122 Nev. 301, 303, 130 P.3d 650, 652 (2006). Although the district court is under no obligation to consider issues raised for the first time at an evidentiary hearing, the court may wish to do so when issues have been brought to light by the evidence adduced at the hearing or implicated by some new law. *Id.* at 304, 130 P.3d at 652. Allowing the presentation of new claims under these circumstances may promote the finality of judgments and be a more efficient use of resources in that all available claims are resolved in a single postconviction proceeding.

If the district court allows the petitioner to expand the issues, the district court should do so explicitly on the record and enumerate the additional issues that it will consider. *Id.* at 303, 130 P.3d at 652.

The district court should not resolve the new issues without first allowing the State an opportunity to respond. *Id.* at 303-04, 130 P.3d at 652.

j) Resolving a Petition After the Evidentiary Hearing

Because the district court may order the record expanded or order the parties to provide further briefing, the resolution of the petition may suffer some delay after the evidentiary hearing. The district court should track the supplemental filings and attempt to resolve the petition as expeditiously as possible.

11. COMMON CLAIMS: INEFFECTIVE ASSISTANCE OF COUNSEL

The most common claim that is raised in postconviction habeas petitions challenging a conviction or sentence is that the petitioner received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 685-86 (1984) (explaining that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results" and therefore the right to counsel is the right to effective assistance of counsel). This section provides a synopsis of the key components to an ineffective-assistance claim and the considerations that are relevant in resolving such a claim.

a) *Strickland* Test (Deficient Performance/Prejudice)

The district court must review a claim of ineffective assistance of counsel under the two-part *Strickland* test, which requires the petitioner to show that:

- Counsel's performance was deficient, **and**
- Counsel's deficient performance prejudiced the defense.

466 U.S. at 687; *accord Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

The district court is not required to address both prongs if the petitioner makes an insufficient showing on either prong. *Strickland*, 466 U.S. at 697. And the court is not obligated to analyze the *Strickland* prongs in a particular order. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed." *Id.* If the court finds that either prong has not been established, the ineffective-assistance claim fails.

Appellate review of the district court's disposition of an ineffective-assistance-of-counsel claim requires deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). However, the district court's application of the law to those facts is reviewed de novo. *Id.*

b) Deficient Performance

To meet the deficient-performance prong of the *Strickland* test, a petitioner must demonstrate that counsel's representation fell below an objective standard of

reasonableness. 466 U.S. at 687-88; *Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). The district court's scrutiny of counsel's performance is highly deferential, should consider that there are countless ways to provide effective assistance in any given case, and should attempt to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689.

In evaluating the reasonableness of counsel's performance, the district court should consider whether trial counsel's assistance was reasonable based on the facts of the particular case and viewed at the time of counsel's conduct. *Id.* at 690. The inquiry is objective—the objective reasonableness of counsel's performance—and does not look at counsel's subjective state of mind. *Harrington v. Richter*, 562 U.S. 86, 109-110 (2011). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id*. at 105 (quoting *Strickland*, 466 U.S. at 640. The United States Supreme Court has recognized that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (citation omitted). Overcoming this presumption requires the petitioner to demonstrate that "counsel failed to act 'reasonabl[y] considering all the circumstances.'" *Id.* (citation omitted). In relying upon this presumption, a court reviewing a claim of ineffective assistance of counsel must "affirmatively entertain the range of possible reasons" that counsel may have had for proceeding as they did. *Id.* at 196.

- A delicate balance is required here. Reviewing courts may not indulge in "'*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions" nor may reviewing courts "insist counsel confirm every aspect of the strategic basis for his or her actions." *Richter*, 562 U.S. at 109 (citation omitted).

- The presumption is that counsel's actions reflect trial tactics rather than sheer neglect. *Id.*

- In emphasizing the objective nature of the inquiry, the United States Supreme Court has noted that after an adverse verdict trial counsel may find it "difficult to resist asking whether a different strategy might have been better" and shifting the blame on themselves. *Id.* at 190-91.

c) Prejudice; When May Prejudice Be Presumed

As a general rule, in addition to demonstrating that counsel's performance was deficient, a petitioner must demonstrate prejudice. For purposes of the prejudice prong of *Strickland*, petitioner must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; Means, 120 Nev. at 1011, 103 P.3d at 32. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The petitioner is required to show a "substantial" not just "conceivable" likelihood of a different result. *Pinholster*, 563 U.S. at 189.

In **assessing prejudice**, the district court should consider the type of claim being made. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) ("[T]he concept of prejudice [under *Strickland*] is defined in different ways depending on the context in which it appears.").

- In a claim challenging the effective assistance of counsel in regard to a **jury trial**, the question is whether there is a reasonable probability that but for trial counsel's error the fact finder would have had a reasonable doubt respecting guilt. *Strickland*, 466 U.S. at 695.
- A claim challenging the effective assistance of counsel at a **sentencing** hearing presents a more general question, whether there is a reasonable probability of a different outcome but for counsel's errors. *See Means*, 120 Nev. at 1011, 103 P.3d at 32.
- In a claim challenging the effective assistance of counsel in **failing to communicate a plea offer**, the question is whether there is a reasonable probability that the defendant "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel" and that "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Missouri v. Frye*, 566 U.S. 134, 147 (2012). Also, the defendant would have "to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.*
- In a claim challenging the effective assistance of counsel in **advising a defendant to reject a favorable plea offer**, the question is whether "the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). The defendant therefore "must show that but for the ineffective advice from counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 164.
- In a claim challenging the effective assistance of counsel when a defendant has entered a **guilty plea**, the question is whether there is a reasonable probability that but for counsel's error the defendant would not have entered a guilty plea and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).
- In a claim challenging the effective of assistance of **appellate counsel**, the question is whether the omitted issue or the deficient argument would have had a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 at 1114.

- In the context of an ineffective-assistance-of-**postconviction-counsel** claim asserted as good cause where the appointment of postconviction counsel was mandated under NRS 34.820, the question is whether postconviction counsel's deficient performance "prevented the petitioner from establishing 'that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State.'" *Rippo v. State*, 134 Nev., Adv. Op. 53, 423 P.3d 1084, 1099 (2018) (quoting NRS 34.724(1)).

Prejudice may be **presumed** in limited circumstances:

- The actual or constructive denial of the assistance of counsel altogether. *Strickland*, 466 U.S. at 692.
- State interference with counsel's assistance that results in counsel's total absence or prevents counsel from assisting the accused during a critical stage of the proceeding. *United States v. Cronic*, 466 U.S. 648, 659 & n.25 (1984).
- An actual conflict of interest—the petitioner must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980). The Nevada Court of Appeals has held that the defendant's mere filing of a bar complaint against defense counsel does not create a per se actual conflict of interest that would give rise to a presumption of prejudice. *Jefferson v. State*, 133 Nev., Adv. Op. 105, 410 P.3d 1000 (Ct. App. 2017).
- In the context of an appeal-deprivation claim, prejudice may be presumed if the petitioner was deprived of the right to a direct appeal due to the ineffective assistance of counsel. *Hathaway v. State*, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); *Lozada v. State*, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994). See section I.B.12 for a discussion of appeal-deprivation claims.

d) Burden of Proof

The petitioner carries the burden of proving **both** prongs of the *Strickland* test (deficient performance and prejudice). *Strickland*, 466 U.S. at 687; *Means*, 120 Nev. 1011, 103 P.3d at 32. The petitioner must prove the facts underlying an ineffective-assistance claim by a preponderance of the evidence. *Means*, 120 Nev. at 1012, 103 P.3d at 33.

12. COMMON CLAIMS: APPEAL DEPRIVATION (*LOZADA*)

A claim that a petitioner was deprived of a direct appeal due to ineffective assistance of counsel presents several special considerations.

a) Deficient Performance

In determining whether a petitioner can demonstrate the deficiency prong of the *Strickland* test for purposes of a claim that he was denied the right to a direct appeal due to

ineffective assistance of counsel, the district court must determine the nature of trial counsel's duty. There are two duties that may be implicated in an appeal-deprivation claim—(1) the duty to accurately inform and consult about the right to appeal and (2) the duty to file a notice of appeal.

- The duty to accurately inform and consult about the right to appeal.
    - When the conviction was the **result of a jury trial**, trial counsel has an **affirmative duty to inform the defendant** of the right to appeal, the procedures for filing an appeal, and the advantages and disadvantages of filing an appeal. *Lozada v. State*, 110 Nev. 349, 356, 871 P.2d 944, 948 (1994). If trial counsel fails to so inform the defendant, trial counsel's performance is deficient.
    - 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** (1) the **defendant inquires** about an appeal or (2) 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*, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); *see also Roe v. Flores-Ortega*, 528 U.S. 470 (2000). If either of these circumstances is present and counsel fails to properly advise the defendant, his or her performance is deficient for purposes of the *Strickland* test.
    - Affirmatively misadvising a client about the availability of an appeal is deficient performance. *Toston v. State*, 127 Nev. 971, 977-78, 267 P.3d 795, 800 (2011).
- The duty to file a notice of appeal
    - Trial counsel has a constitutional duty to file a direct appeal when requested to do so or when a defendant expresses dissatisfaction with the conviction. *Toston*, 127 Nev. at 978, 267 P.3d at 800. If trial counsel fails to do so, his or her performance is deficient for purposes of the *Strickland* test. *Davis v. State*, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).
        - In determining whether counsel has a duty under the second circumstance, expressing dissatisfaction with the conviction, the court must consider whether counsel knew or should have known that the defendant wanted to appeal the conviction based upon the totality of the circumstances. *Toston*, 127 Nev. at 978-79, 267 P.3d at 801. When the conviction is based upon a guilty plea, the court may consider whether the defendant received the bargained-for sentence, whether any issues were reserved for appeal, whether the defendant indicated a desire to appeal within the time period, whether the defendant sought relief from the plea before sentencing. *Id.* at 979-80, 267 P.3d at 801.

Because the facts regarding this claim may fall outside the record, an evidentiary hearing is often essential to the district court's consideration of the merits of the claim.

b) Presumed Prejudice

If the district court determines that trial counsel's performance was deficient (i.e., it deprived the petitioner of the right to a direct appeal), then prejudice is presumed. *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). This is true regardless of the availability of any meritorious direct appeal claims.

c) Procedural Bars

An appeal-deprivation claim must be raised in a timely filed postconviction petition. *Dickerson v. State*, 114 Nev. 1084, 967 P.2d 1132 (1998); *Hathaway v. State*, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003) (explaining that claims that counsel failed to inform the petitioner of the right to appeal and that the petitioner received misinformation about the right to appeal "would be reasonably available to the petitioner within the statutory time period"). However, an appeal-deprivation claim may provide good cause to excuse the delay in filing a postconviction petition 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*, 119 Nev. at 254, 71 P.3d at 507-08. If the petitioner makes such allegations and they are not belied by the record, the district court must grant an evidentiary hearing to determine whether the petitioner can demonstrate good cause. *See id.* at 255, 71 P.3d at 508.

d) Remedy under NRAP 4(c) (eff. 7/1/09)

The remedy for a meritorious appeal-deprivation claim is set forth in NRAP 4(c). That rule allows for an untimely notice of appeal if the district court has determined that the petitioner was deprived of the right to a direct appeal due to the ineffective assistance of counsel.

NRAP 4(c) includes provisions that impact the district court. If the district court determines that the petitioner was deprived of his right to a direct appeal due to ineffective assistance of counsel, the court must enter a written order that includes the following:

- ✓ Specific findings of fact and conclusions of law finding that the petitioner has established a valid and timely appeal-deprivation claim and is entitled to a direct appeal with the assistance of appointed or retained counsel.
- ✓ If the petitioner is indigent, directions for the appointment of appellate counsel to represent the petitioner in the direct appeal. Trial counsel cannot be appointed to represent the petitioner in the direct appeal.
- ✓ Directions to the district court clerk to prepare and file a notice of appeal on the petitioner's behalf within 5 days.

NRAP 4(c)(1)(B). The district court clerk is then required to serve certified copies of the district court's written order and the notice of appeal on:

- ✓ The petitioner and his postconviction counsel, if any.
- ✓ The respondent.
- ✓ The attorney general.
- ✓ The district attorney for the county in which the petitioner was convicted.
- ✓ The attorney appointed to represent the petitioner in the untimely appeal.
- ✓ The clerk of the Nevada Supreme Court

NRAP 4(c)(2). The notice of appeal prepared by the clerk must designate the judgment of conviction as the order or judgment being appealed, not the district court's order granting the postconviction habeas petition. *See Abdullah v. State*, 129 Nev. 86, 294 P.3d 419 (2013).

There also are provisions in NRAP 4(c) that address **federal court orders** to grant a defendant relief based on an appeal-deprivation claim; those provisions are directed at the district court clerk. When a federal court of competent jurisdiction determines that a Nevada inmate was deprived of the right to a direct appeal due to ineffective assistance of counsel and issues a final order directing the state to provide a direct appeal to a federal habeas petitioner, the petitioner or his counsel must file the federal court's order with the district court clerk for the county in which the petitioner was convicted within 30 days after entry of the federal court's order. The district court clerk then has 30 days to prepare and file a notice of appeal on the petitioner's behalf. That notice of appeal must designate the judgment of conviction as the order or judgment being appealed. NRAP 4(c)(1)(C).

For purposes of **procedural bars**, the rule provides that the timeliness provisions governing any subsequent habeas petition attacking the validity of the conviction begin to run upon the termination of the direct appeal authorized by NRAP 4(c). The rule further provides that a habeas petition filed after an appeal authorized by NRAP 4(c) shall not be deemed a "second or successive petition" under NRS 34.810(2). NRAP 4(c)(5). As a result, the district court may not need to decide the rest of the claims in a petition that raised a meritorious appeal-deprivation claim. To avoid piecemeal litigation, the court could stay the proceedings on the remainder of the petition or dismiss the petition without prejudice.

13. COMMON CLAIMS: *BRADY* VIOLATIONS

Another common claim raised in postconviction petitions is that the State withheld favorable evidence in violation of a defendant's due process rights. *Brady v. Maryland*, 373 U.S. 83 (1963). This section provides a synopsis of the three components of a *Brady* claim and the relevant analysis when a *Brady* claim is raised in a petition that is subject to a procedural bar.

a) *Brady* Analysis

"There is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). But in *Brady*, the Supreme Court required as a matter of due process that the State disclose evidence to the defense in certain circumstances. To make a successful claim under *Brady*, the petitioner must demonstrate that:

1. The evidence at issue is favorable to the accused,
2. The evidence was withheld by the State, and
3. Prejudice.

State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); *Mazzan v. Warden (Mazzan II)*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). The duty to disclose material exculpatory evidence extends to a defendant pleading guilty. *State v. Huebler*, 128 Nev. 192, 198-200, 275 P.3d 91, 96-97 (2012). Because a *Brady* claim involves questions of fact and law, the Nevada Supreme Court will review the district court's decision de novo. *Bennett*, 119 Nev. at 599, 81 P.3d at 7-8.

(1) Favorable Evidence

"Favorable" evidence for purposes of *Brady* is not limited to exculpatory evidence. Impeachment evidence may also be favorable for purposes of *Brady*, including evidence that "provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks." *Mazzan II*, 116 Nev. at 67, 993 P.2d at 37; *see also United States v. Bagley*, 473 U.S. 667, 676 (1985). The evidence need not be independently admissible. *Mazzan II*, 116 Nev. at 67, 993 P.2d at 37. The United States Supreme Court has indicated that "the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995), *quoted in Mazzan II*, 116 Nev. at 71, 993 P.2d at 39.

(2)Withheld by the State

The State has an affirmative duty to disclose favorable evidence in its possession regardless of whether the defense has made a discovery request. *United States v. Agurs*, 427 U.S. 97, 107 (1976); *Bennett*, 119 Nev. at 601, 81 P.3d at 9. The State's duty is a continuing one—it does not end with the start of trial or the return of a guilty verdict. *Bennett*, 119 Nev. at 601, 81 P.3d at 9. The State does not, however, have a constitutional duty to disclose impeachment evidence before entry of a guilty plea. *United States v. Ruiz*, 536 U.S. 622, 628-30 (2002).

Brady does not require the prosecution to deliver its entire file to the defense. *Bagley*, 473 U.S. at 675. The United States Supreme Court has indicated, however, that in certain circumstances if the State "asserts that [it] complies with *Brady* through an open file policy,

defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." *Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999).

The State is charged with possession of evidence in the custody of other state agents. *Bennett*, 119 Nev. at 603, 81 P.3d at 10; *Jimenez v. State*, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996). As the United States Supreme Court has explained, "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (quoting *Kyles*, 514 U.S. at 438); *Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

It is irrelevant under *Brady* whether the State acted intentionally or inadvertently in withholding the evidence. *Brady*, 373 U.S. at 87; *Mazzan II*, 116 Nev. at 67, 993 P.2d at 37; *see also Agurs*, 427 U.S. at 110 ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

(3) Prejudice: Material Evidence

Prejudice for purposes of *Brady* turns on whether the withheld favorable evidence is **material** to guilt or to punishment. *Mazzan II*, 116 Nev. at 66, 993 P.2d at 36. The Nevada Supreme Court adheres to separate materiality tests depending on whether there was a specific request for the evidence. *Roberts v. State*, 110 Nev. 1121, 1128-32, 881 P.2d 1, 5-8 (1994) (reviewing federal and state authority and deciding to preserve, on state law grounds, separate materiality tests based on whether there was a specific request), *overruled on other grounds by Foster v. State*, 116 Nev. 1088, 13 P.3d 61 (2000). Nevada district courts therefore need to ensure that the proper materiality test is employed in order to withstand review on appeal.

If there was a **specific request** for the evidence, the evidence is material "if there is a **reasonable possibility** that the omitted evidence would have affected the outcome." *Mazzan II*, 116 Nev. 66, 993 P.2d at 36. The question is whether "'the suppressed evidence might have affected the outcome of the trial,'" not by a mere possibility but by a real possibility. *Roberts*, 110 Nev. at 1132, 881 P.2d at 8 (quoting *Agurs*, 427 U.S. 97, 104 (1975)).

If there was **no request or only a general request**, the evidence is material "if there is a **reasonable probability** that the result would have been different if the evidence had been disclosed." *Mazzan II*, 116 Nev. 74, 993 P.2d at 41. This is not a sufficiency-of-the-evidence test—the defendant need not show "that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35. Rather, "[a] reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial." *Mazzan II*, 116 Nev. 74, 993 P.2d at 41; *see also Kyles*, 514 U.S. at 434-35.

Materiality is determined by looking at the undisclosed evidence collectively rather than item by item. *Kyles*, 514 U.S. at 436; *Mazzan II*, 116 Nev. 66, 993 P.2d at 36.

Once the petitioner "has articulated a substantial basis for claiming materiality," the State "bears the burden of avoiding discovery by seeking *in camera* review" by the district court. *Roberts*, 110 Nev. at 1134-35, 881 P.2d at 9; *see also Agurs*, 427 U.S. at 106 (explaining that once a defendant states a substantial basis for claiming materiality, "it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge").

In the context of a petitioner challenging the validity of a guilty plea based on the State's failure to disclose exculpatory evidence, the prejudice or materiality test is slightly different in light of the presumption that a guilty plea is valid and the petitioner's burden to overcome the presumption of validity. *Huebler*, 128 Nev. at 202-03, 275 P.3d at 98. Where there was no specific request for the evidence, to demonstrate materiality, a petitioner must show a reasonable probability that but for the failure to disclose the *evidence*, the petitioner would have refused to enter a guilty plea and would have gone to trial. *Id.* at 203, 275 P.3d at 98. Where there was a specific request for the evidence, a petitioner must demonstrate a reasonable possibility that but for the failure to disclose the evidence the petitioner would have refused to plead and would have insisted on going to trial. *Id.* at 203, 275 P.3d at 99.

- ✓ In considering materiality in the context of a guilty plea, the court should consider the relative strength and weakness of the State's case and the defendant's case, the persuasiveness of the withheld evidence, the reasons for the defendant's choice to enter a guilty plea if any are expressed, the benefits obtained by the plea bargain, and the thoroughness of the plea canvass. *Id.* at 203-04, 275 P.3d at 99.

b) *Brady* Claims and Procedural Bars

By their very nature, *Brady* claims are often raised in petitions that are procedurally barred. When a *Brady* claim is raised for the first time in a postconviction petition or in an untimely or successive postconviction petition, the petitioner has the burden of pleading and proving specific facts that demonstrate good cause and actual prejudice to overcome the procedural bars. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). In particular, the petitioner must identify with specificity the evidence that was withheld and explain why he did not raise the *Brady* claim sooner. *Moore v. State*, 134 Nev., Adv. Op. 35, 417 P.3d 356, 359 (2018). Given this pleading requirement, the petitioner must be "forthright" and "cannot force the district court to hold an evidentiary hearing by withholding information about a claim." *Id.*

(1) Good Cause

As a general matter, the good-cause showing to overcome the procedural bars parallels the second component of a *Brady* claim. In other words, "proving that the State withheld

the evidence generally establishes cause" to overcome the procedural bars. *Bennett*, 119 Nev. at 599, 81 P.3d at 8.

The second component of a *Brady* claim may not, however, be sufficient to establish good cause to overcome a procedural bar if the petitioner knew about the factual basis for the claim in time to address it in a prior proceeding or in a timely petition. *See Huebler*, 128 Nev. at 198 n.3, 275 P.3d at 95 n.3 ("We note that a *Brady* claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense."); *see also Hathaway v. State*, 119 Nev. 248, 253-55, 71 P.3d 503, 506-08 (2003); *Strickler*, 527 U.S. at 287, 288 n.33 (distinguishing prior decisions on cause because in those cases, "the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier" and stating that Court did not reach "impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them" because the issue was not raised); *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996) (recognizing that a *Brady* claim was not cognizable in federal habeas proceeding because petitioner knew about the factual basis for the claim at the time he litigated his state petition but did not raise the claim in the state petition and made no attempt to demonstrate cause or prejudice for his default in the state habeas proceedings). If the petitioner cannot demonstrate cause, then it may be necessary to determine whether the *Brady* evidence is sufficient to establish a fundamental miscarriage of justice to excuse the procedural default. *See* section I.B.9.F.3.

(2) Actual Prejudice

Generally, the prejudice required to overcome the procedural bars parallels the third component of a *Brady* claim. In other words, "proving that the withheld evidence was material establishes prejudice" for purposes of the procedural bars. *Bennett*, 119 Nev. at 599, 81 P.3d at 8.

(3) Laches

When a *Brady* claim is raised in a petition that is subject to laches under NRS 34.800 and the State has affirmatively pleaded laches, the petitioner must overcome the presumption of prejudice to the State as provided in NRS 34.800(1). The Nevada Supreme Court has not addressed laches in the context of a *Brady* claim in a published opinion. A district court facing this issue should consider whether the second and third components of a *Brady* claim—the State withheld the evidence and prejudice—are sufficient to meet the petitioner's burden under NRS 34.800(1)(a) to show that he could not have had knowledge of the *Brady* claim by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred and under NRS 34.800(1)(b) to show a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence.

14. SPECIAL ISSUES IN DEATH PENALTY CASES

Special procedures apply to a petition filed by a person who has been sentenced to death. Those procedures are set forth in NRS 34.820 and SCR 250. Otherwise, these petitions are subject to the same provisions as any other postconviction petition challenging a judgment of conviction or sentence.

a) Petition Must Be Given Priority

The district court is required to give calendar priority to death penalty cases and to conduct proceedings in those cases "with minimal delay." SCR 250(5)(a); *see also* NRS 34.820(7) (providing that the judge "shall make all reasonable efforts to expedite the matter"). The court also is required to "render a decision within 60 days after submission of the matter for decision." NRS 34.820(7).

b) First Petition (Stay Execution and Appoint Counsel)

If the petition is filed by a person who has been sentenced to death and is the first petition challenging the judgment of conviction or sentence, the district court must (1) stay execution of the judgment until the petition and any appeal are resolved and (2) appoint counsel to represent the petitioner. NRS 34.820(1).

SCR 250 governs the qualifications of counsel appointed in postconviction proceedings in the district court. To be appointed as postconviction counsel representing a petitioner who has been sentenced to death, an attorney must have acted as counsel in at least two postconviction proceedings arising from felony convictions and the district court must be satisfied that counsel is capable and competent to represent the petitioner. SCR 250(2)(c). If an attorney does not satisfy those requirements, the district court must "hold a hearing to assess the attorney's competence and ability to act as [postconviction] counsel." SCR 250(2)(e). At the hearing, the district court is required to "thoroughly investigate the attorney's background, training, and experience and consult with the attorney on his or her current caseload." *Id.* If the district court is satisfied that the attorney can provide competent representation, the district court shall make a finding on the record and appoint the attorney. SCR 250(2)(e).

Unlike at trial, the district court may appoint only one attorney in the postconviction proceeding. SCR 250(2)(f).

c) When to Order an Evidentiary Hearing

In deciding whether to grant an evidentiary hearing on a petition filed by a person who has been sentenced to death, the district court should apply the same general principles that apply to other postconviction petitions. See section I.B.10 for a discussion of those principles.

A petitioner who has been sentenced to death is not entitled to an evidentiary hearing unless the petition states that each issue to be considered at the hearing has not been determined in a prior evidentiary hearing in state or federal court or, if an issue has been determined at a prior evidentiary hearing, that the prior hearing was not a full and fair consideration of the issue. NRS 34.820(2).

d) Daily Transcripts Required

If an evidentiary hearing is conducted, the district court must ensure that a daily transcript is prepared for the purpose of appellate review. NRS 34.820(6); SCR 250(5)(a). The district court may employ audio recording equipment as a backup or in lieu of a court reporter. SCR 250(5)(c). The person responsible for the recording shall prepare a daily transcript of all proceedings and deliver it to the court and counsel. *Id.*

e) Caution Regarding Piecemeal Litigation

"The court shall inform the petitioner and his counsel that all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and that any matter not included in the petition will not be considered in a subsequent proceeding." NRS 34.820(4). Despite this language, the district court should consider new claims that are raised in any subsequent proceedings under the appropriate procedural bar analysis.

15. PRESENTENCE CREDITS

A claim for presentence credits is a challenge to the validity of the judgment of conviction and sentence. It therefore must be raised in a habeas petition filed in the district court for the county in which the judgment of conviction was obtained and the petition must comply with all procedural rules applicable to a habeas petition that challenges the validity of the judgment of conviction and sentence. *See Griffin v. State*, 122 Nev. 737, 744-45, 137 P.3d 1165, 1169-70 (2006). If an inmate files a motion requesting presentence credits, the motion should be treated as a postconviction petition challenging the judgment of conviction.

C. COMPUTATION OF TIME SERVED

1. INTRODUCTION

An incarcerated person may file a postconviction petition for a writ of habeas corpus to challenge the computation of time served pursuant to a judgment of conviction. NRS 34.724(1). A postconviction petition for a writ of habeas corpus is the **only remedy** available for an incarcerated person to challenge the computation of time served pursuant to a judgment of conviction. NRS 34.724(2)(c).

2. JURISDICTION: WHERE IS THE PETITION FILED?

A petition that challenges the computation of time served must be filed with the clerk of the district court for the county in which the petitioner is incarcerated. NRS 34.738(1). If the petition is filed in the wrong county, the district court should order the clerk of the district court to transfer the petition to the appropriate county. NRS 34.738(2)(b).

3. STANDING

The petitioner's standing to file the petition may impact the district court's handling of the petition.

The Nevada Constitution gives the district courts the power to issue writs of habeas corpus "on petition by . . . *any person who is held in actual custody* in their respective districts." Nev. Const. art. 6, § 6(1) (emphasis added). Similarly, NRS 34.724(1) limits a postconviction habeas petition challenging the computation of time served to those individuals who

- ✓ have been convicted of a crime, and
- ✓ are under sentence of death or imprisonment.

Based on these provisions, the district court should dismiss a petition that challenges the computation of time served if the petitioner has expired the challenged sentence. *See Johnson v. Director, Dep't Prisons*, 105 Nev. 314, 316, 774 P.2d 1047, 1049 (1989).

4. RESPONSE OR ANSWER AND RETURN

The State typically will respond to a petition only if the district court orders it to do so. In many instances, despite a certificate of service attached to a petition, the State may not have been served and may be unaware that the petition is pending until it receives an order for an answer.

If the petition challenges the computation of time served, the district court must order the **Attorney General** to file a response or answer and a return or may order the attorney general to "[t]ake other action that the judge . . . deems appropriate." NRS 34.745(2)(a), (b).

The statute allows for a response or answer and a return "within 45 days or a longer period fixed by the judge." NRS 34.745(2)(a).

The order directing a response or answer and a return must be in "substantially" the form provided in NRS 34.745(3) and must be served on the petitioner or his counsel, the respondent, the Attorney General, and the district attorney of the county in which the petitioner was convicted.

5. CHALLENGE TO AMOUNT OF CREDITS EARNED AFTER SENTENCE IMPOSED

A challenge to the computation of time served often involves credits earned **after imposition of a sentence and entry of the judgment of conviction,** primarily those earned under NRS chapter 209. *Griffin v. State*, 122 Nev. 737, 743, 137 P.3d 1165, 1169 (2006) ("It is more logical to read the language 'pursuant to a judgment of conviction' to refer to credit earned after a petitioner has begun to serve the sentence specified in the judgment of conviction."). This includes a claim that credits are not being applied to an inmate's minimum term (*i.e.*, parole eligibility). *Williams v. Nev., Dep't of Corr.*, 133 Nev., Adv. Op. 75, 402 P.3d 1260, 1262 (2017).

The following are the most typical challenges to the computation of time served.

a) Failure to Correctly Award Statutory Credits (Good Time, Work Time, or Other Meritorious Credits)

Inmates frequently challenge the failure to award good time, work time, or other meritorious credits after a petitioner has begun to serve the sentence. The amount of credits that an inmate may be entitled to depends in most instances on the date of the offense and/or the date of sentencing. Statutory credits are governed by NRS chapter 209 as follows:

- ✓ NRS 209.433 (credits for offenders sentenced on or before June 30, 1969)
- ✓ NRS 209.443 (credits for offenders sentenced after June 30, 1969, for crime committed before July 1, 1985)
- ✓ NRS 209.446 (credits for offenders sentenced for crime committed on or after July 1, 1985, but before July 17, 1997)
- ✓ NRS 209.4465 (credits for offenders sentenced for crime committed on or after July 17, 1997)
- ✓ NRS 209.4465 was amended in 2007 to increase the amount of credits with limited retroactive effect. 2007 Nev. Stat., ch. 525, §§ 5, 21, at 3176, 3196.
- ✓ NRS 209.447 (credits for offenders sentenced after June 30, 1991, for crime committed before July 1, 1985, and released on parole)
- ✓ NRS 209.4475 (credits for offenders on parole as of January 1, 2004, or released on parole on or after January 1, 2004)
- ✓ NRS 209.448 (credits for completion of program of treatment for abuse of alcohol or drugs)
- ✓ NRS 209.449 (credits for completion of vocational education and training or other program).

The petitioner bears the burden of demonstrating that he was not awarded the proper amount of credits.

The credit history report maintained by the Department of Corrections may be necessary to resolve claims challenging the failure to award the proper amount of statutory credits. When the credit history report is necessary and was not included with the response or answer to the petition, the court should order the attorney general to provide the report.

(1) Application of Statutory Credits to Minimum Term

Interpreting NRS 209.4465(7)(b), the Nevada Supreme Court has held that some inmates are entitled to have their credits earned under NRS chapter 209 applied to the minimum term of their sentence, thereby advancing the inmate's parole eligibility. *Williams v. Nev., Dep't of Corr.*, 133 Nev., Adv. Op. 75, 402 P.3d 1260, 1265 (2017). The decision applies to offenses committed on or between July 17, 1997, and June 30, 2007, where the relevant sentencing statute was silent as to parole eligibility. *Id*. at 1265 n.7. For offenses committed after June 30, 2007, NRS 209.4465(8) provides several exceptions to NRS 209.4465(7)(b). The Nevada Court of Appeals has rejected an equal-protection challenge to disparate treatment of inmates with respect to the application of credits to the minimum term of a sentence. *Vickers v. Dzurenda*, 134 Nev., Adv. Op. 91, 433 P.3d 306 (Ct. App. 2018).

If the inmate has already received a parole hearing or discharged the sentence, no relief can be granted on a claim that credits were not properly applied to the minimum term. *Williams*, 133 Nev., Adv. Op. 75, 402 P.3d at 1265 n.7.

(2) Work/Labor Credits

The Nevada Court of Appeals has held that the plain language of NRS 209.4465(2) allows the Director of the Department of Corrections to award credits for "diligence in labor" only when the inmate has actually engaged in labor. *Vickers v. Dzurenda*, 134 Nev., Adv. Op. 91, 433 P.3d 306 (Ct. App. 2018). Thus, if an inmate has not worked, he cannot be awarded work/labor credits under NRS 209.4465(2). *Id.*

b) Failure to Correctly Calculate Amount of Credits

Petitions also frequently challenge the calculation of credits. These claims may be presented as a challenge to the Department of Corrections' methodology in calculating credits, with petitioners suggesting that the Department uses a mathematical formula to reduce the statutory credits.

The petitioner bears the burden of demonstrating that the calculations are incorrect. It is important to authenticate documentation received from the petitioner because unauthenticated documents may be submitted in support of these claims.

Again, the credit history report maintained by the Department of Corrections may be necessary to resolve this type of claim. When the credit history report is necessary and

was not included with the response or answer to the petition, the court should order the attorney general to provide the report.

6. CHALLENGES TO PRISON DISCIPLINARY PROCEEDINGS

Incarcerated petitioners frequently file habeas petitions to challenge prison disciplinary proceedings. Whether the challenge may be raised in a habeas petition depends on the nature of the sanctions imposed as a result of the disciplinary proceeding.

a) Habeas Is Limited to Loss of Credits

When the disciplinary proceeding results in the **loss of credits**, an incarcerated person **may challenge** the loss of those credits in a habeas petition. *See Wolff v. McDonnell*, 418 U.S. 539, 554 (1974).

When the disciplinary proceeding results in **sanctions other than the loss of credits**, such as placement in disciplinary segregation, transfer to another facility, and loss of privileges, the proceeding **cannot be challenged** in a postconviction habeas petition because the challenge involves the conditions of confinement rather than a challenge to the conviction or sentence or the computation of time served. *Bowen v. Warden*, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984); *see also Sandin v. Conner*, 515 U.S. 472, 486 (1995) (holding that liberty interests protected by the Due Process Clause will generally be limited to freedom from restraint which imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life).

> **Note:** When the sanctions resulting from a prison disciplinary proceeding involve the conditions of confinement, the inmate may seek relief in the district court through an appropriate civil action such as a civil rights complaint filed under § 1983. These materials do not address those proceedings.

Thus, the threshold issue for the district court is whether the disciplinary proceeding resulted in the loss of credits. The district court should summarily deny a petition that challenges a disciplinary proceeding if the disciplinary proceeding did not result in the loss of credits. If the disciplinary sanctions are mixed, the court should resolve any claims related to the loss of credits and deny any other claims.

b) Applicability of NRS 34.720 to 34.830

The Nevada Supreme Court has never addressed whether a petition that challenges the loss of credits as the result of a prison disciplinary proceeding should be treated as a petition filed under NRS 34.360 (“true habeas” challenging the legality of the confinement)

or a petition filed under NRS 34.724(1) (postconviction petition challenging the computation of time served). However, such a petition seems to involve a challenge to the computation of time served under NRS 34.724(1) because the computation is affected by the loss of credits. As a result, the provisions of NRS 34.720 to 34.830 should be applied to petitions that challenge a prison disciplinary hearing that resulted in the loss of credits. *See* NRS 34.720. These materials take that approach, but it is an open question.

c) Jurisdiction

The petition should be filed in the district court for the county in which the petitioner is incarcerated. NRS 34.738(1).

d) Response or Answer

The district court should order the **attorney general** to file a response or answer. *See* NRS 34.745(2). To assist the court in evaluating the claims, the judge may require the attorney general to provide, as a part of the response, copies of the prison disciplinary hearing proceedings, including any transcripts previously prepared, and/or the audiotape of the prison disciplinary hearing if the hearing was recorded. The record of proceedings that involved testimony by a confidential informant may need to be filed under seal and reviewed in camera.

e) Appointment of Counsel

The district court has discretion to appoint counsel. *See* NRS 34.750.

f) Due Process Challenges

The United States Supreme Court has recognized that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply," and consequently, the Supreme Court only requires minimal due process at a prison disciplinary hearing. *Wolff*, 418 U.S. at 556, 563. The following minimal due process protections are required in a prison disciplinary hearing:

- ✓ Advance written notice of the charges. *Id.* at 563-64.
- ✓ A written statement of the evidence relied upon and the reasons for disciplinary action. *Id.* at 563-65.
- ✓ A qualified right to call witnesses and present evidence. *Id.* at 566. The right to confront and cross-examine witnesses does not apply in prison disciplinary proceedings. *Id.* at 567-68. But due process requires that if a request to present witnesses is refused, prison officials must explain that decision, in a limited manner, either on the record at the prison disciplinary hearing or in later testimony in court if the prisoner challenges the refusal to permit witnesses. *Ponte v. Real*, 471 U.S. 491, 497 (1985).

- ✓ When the inmate is illiterate or the hearing involves complex issues, the inmate "should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff." *Wolff*, 418 U.S. at 570. Counsel is not required. *Id.*
- ✓ An impartial decision maker. *Id.* at 571.
- ✓ Some evidence in support of the hearing officer's decision. *Superintendent v. Hill*, 472 U.S. 445, 455, 457 (1985). In determining whether there is "some evidence," the court is not required to examine the entire record, independently assess the credibility of the witnesses, or weigh the evidence; but rather, the court must determine whether there is any evidence in the record to support the hearing officer's finding of guilt. *Id.* at 455.

The sufficiency of the evidence supporting the hearing officer's decision is only relevant when the basis for the attack on the decision is insufficiency of the evidence. Thus, the court cannot rely on the sufficiency of the evidence to reject an attack on the decision based on the failure to meet one of the other minimal due process protections. *See Edwards v. Balisok*, 520 U.S. 641, 647-48 (1997).

To the extent that the Department of Corrections' regulations provide additional procedural protections, a violation of those regulations does not violate due process. *Sandin*, 515 U.S. at 477-84 (examining prior precedent and rejecting the approach that due process springs from mandatory language and recognizing that a protected liberty interest must be implicated for due process to apply).

g) Evidentiary Hearing

The district court should conduct an evidentiary hearing if the petitioner has raised claims that are not belied by the record and that, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). The resolution of a due process claim may require the district court to examine the prison disciplinary hearing proceedings and conduct an evidentiary hearing if the prison disciplinary hearing record is deficient on the points raised in the petition. See section I.B.10 for a discussion of evidentiary hearings.

h) What Is the Remedy If the Challenge Has Merit

If the petition has merit, the remedy depends upon the type of due process violation. If the district court determines that "some evidence" was not presented during the disciplinary proceedings, the district court should order the Department of Corrections to restore the forfeited credits. If the district court determines that one of the other due process requirements was violated, the district court should order the Department to restore credits and conduct a new prison disciplinary hearing.

7. PROCEDURAL BARS

The procedural bars set forth in NRS chapter 34 apply only in part to petitions that challenge the computation of time served.

The time limit set forth in **NRS 34.726 does not** apply to a petition that challenges the computation of time served. *See* NRS 34.726(1) (providing that time limit applies to "a petition that challenges the validity of a judgment or sentence").

The procedural bar against a **second or successive petition under NRS 34.810(2) applies** if a prior petition litigated the same computation claim and the claim was decided on the merits. In such cases, the petition must be denied unless the petitioner has demonstrated good cause and actual prejudice. See section I.B.9 regarding second or successive petitions challenging a judgment of conviction and sentence for the showings required to demonstrate good cause and actual prejudice.

II. POSTCONVICTION MOTION TO WITHDRAW GUILTY PLEA

The Nevada Supreme Court has held that a motion to withdraw a guilty plea pursuant to NRS 176.165 that is filed *after* sentencing must be treated as a postconviction habeas petition, subject to the provisions of NRS chapter 34, when the defendant is still under a sentence of imprisonment for the conviction being challenged. *Harris v. State*, 130 Nev. 435, 447-49, 329 P.3d 619, 627-28 (2014) (overruling *Hart v. State*, 116 Nev. 558, 1 P.3d 969 (2000)).

In response to *Harris*, the Nevada Legislature added a section to NRS 34.724 that allows for a motion to withdraw a guilty plea under NRS 176.165 to be filed after sentencing if four conditions are satisfied. NRS 34.724(3). Those conditions are: (a) the person has not filed any other motion to withdraw the plea or a postconviction habeas petition; (b) the motion is filed within 1 year after the conviction, unless the person filing it "pleads specific facts demonstrating that some impediment external to the defense precluded bringing the motion earlier"; (c) the person is "not incarcerated for the charge for which the person entered the plea"; and (d) the motion is not barred by laches. *Id.* As to the last condition (laches), the statute provides a rebuttable presumption of prejudice to the State on the basis of laches if the motion is filed "more than 5 years after the date on which the person was convicted." NRS 34.724(3)(d). The Nevada Supreme Court has not yet addressed NRS 34.724(3) in a published opinion, but the provision likely has little practical impact on the holding in *Harris* given the conditions in paragraphs (a)-(d) that appear to make it difficult for anyone to take advantage of subsection 3.

If an inmate is able to meet the conditions set forth in NRS 34.724(3) to pursue a postconviction motion to withdraw a guilty plea, the motion may be granted upon a showing of "manifest injustice." NRS 176.165. The Nevada Supreme Court has not defined "manifest injustice" for purposes of NRS 176.165, but the discussion in *Little v. Warden*, 117 Nev. 845, 34 P.3d 540 (2001), may provide some guidance.

The Legislature has provided that the district court "shall not appoint counsel" to represent a person in connection with a postjudgment motion to withdraw a guilty plea. NRS 34.724(4).

III. MOTION TO CORRECT AN ILLEGAL SENTENCE

A. INTRODUCTION

NRS 176.555 provides that the district court "may correct an illegal sentence at any time." The motion is considered to be incident to the trial court proceedings and therefore is not affected or abolished by the statutory provisions governing postconviction petitions for writs of habeas corpus. *Edwards v. State*, 112 Nev. 704, 707, 918 P.2d 321, 323-24 (1996).

B. NO TIME LIMIT FOR FILING

There is no time limit for filing a motion to correct an illegal sentence. *See* NRS 176.555.

C. LIMITED TO FACIAL LEGALITY

A motion to correct an illegal sentence may only challenge the facial legality of the sentence. The facial legality of a sentence depends on two factors:

- ✓ Whether the district court was without jurisdiction to impose a sentence.
  - o The jurisdiction of the court should not be confused with trial-court error. "The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts." Nev. Const., art. 6, § 6(1).
- ✓ Whether the sentence imposed exceeds the statutory maximum.

Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Because a motion to correct an illegal sentence presupposes a valid judgment of conviction, a motion to correct an illegal sentence cannot be used to challenge errors occurring before or at trial or other errors occurring at sentencing. *Id.*

The district court should summarily deny a motion to correct an illegal sentence that raises claims that fall outside the proper scope of such a motion. *Edwards*, 112 Nev. at 708-09 n.2, 918 P.2d at 325 n.2.

IV. MOTION TO MODIFY SENTENCE

A. INTRODUCTION

Although the district court generally lacks jurisdiction to suspend or modify a defendant's sentence after the defendant begins to serve it, NRS 176A.400(3); *Passanisi v. State*, 108 Nev. 318, 322, 831 P.2d 1371, 1373 (1992), the court may grant a postconviction motion to modify a sentence in limited circumstances, *id.* at 322-23, 831 P.2d at 1373-74; *see also Edwards v. State*, 112 Nev. 704, 707, 918 P.2d 321, 324 (1996). The motion is considered to be incident to the trial court proceedings and therefore is not affected or abolished by the statutory provisions governing postconviction petitions for writs of habeas corpus. *Edwards*, 112 Nev. 704, 918 P.2d 321.

B. NO TIME LIMIT

No statute or case law sets forth a time limit for filing a motion to modify a sentence.

C. LIMITATIONS ON SCOPE

The district court may modify a sentence when:

- ✓ The court made a material mistake of fact about the defendant's criminal record, and
- ✓ The mistake worked to the defendant's extreme detriment.

Edwards, 112 Nev. at 708, 918 P.2d at 324; *Passanisi*, 108 Nev. at 322-23, 831 P.2d at 1373-74. The district court's misapprehension regarding the legal consequences of a sentence does not permit the district court to modify the sentence after the defendant has begun to serve the sentence. *State v. Kimsey*, 109 Nev. 519, 522, 853 P.2d 109, 111 (1993) (holding that district court could not modify sentence based on misapprehension of parole consequences of stacking multiple sentences).

The district court should summarily deny a motion to modify a sentence that raises claims that fall outside the proper scope of such a motion. *Edwards*, 112 Nev. at 708-09 n.2, 918 P.2d at 325 n.2.

V. POST-JUDGMENT MOTION FOR A NEW TRIAL

A. INTRODUCTION

A defendant may file a motion for new trial based on newly discovered evidence or any other ground. A motion that is based on any ground other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilt or such time as fixed by the district court within the 7-day period. NRS 176.515(4). In contrast, a motion that is based on newly discovered evidence may be filed after the judgment of conviction. NRS 176.515(1). A post-judgment motion for new trial based on newly discovered evidence is considered to be incident to the trial court proceedings and therefore is not affected or abolished by the statutory provisions governing postconviction petitions for writs of habeas corpus. *Hart v. State*, 116 Nev. 558, 563 n.4, 1 P.3d 969, 972 n.4 (2000), *overruled on other grounds by Harris v. State*, 130 Nev. 435, 447-49, 329 P.3d 619, 627-28 (2014).

B. 2-YEAR TIME LIMIT AND EXCEPTIONS

A motion for a new trial based on newly discovered evidence must be filed within 2 years after the verdict or finding of guilt. NRS 176.515(3). The district court must dismiss an untimely motion.

The 2-year time limit does not apply when a defendant obtains genetic marker testing under NRS 176.0918 and NRS 176.09183 and the results of the tests are favorable to the defendant. In such cases, the defendant may file a motion for a new trial relying on the tests as newly discovered evidence and the motion is not subject to the 2-year time limit. NRS 176.09187(1); NRS 176.515(3).

C. EFFECT OF PENDING DIRECT APPEAL

The district court retains jurisdiction to grant a post-judgment motion for a new trial based on newly discovered evidence even if an appeal from the judgment of conviction is pending in the Nevada Supreme Court. *See Vest v. State*, 120 Nev. 669, 98 P.3d 996 (2004).

D. STANDARDS FOR GRANTING MOTION

A motion for a new trial filed after entry of the judgment of conviction must be based upon newly discovered evidence.

1. General Test for Newly Discovered Evidence

The district court should grant a motion for a new trial based on newly discovered evidence only if the following components are met:

- ✓ The evidence is newly discovered.
- ✓ The evidence is material to the defense.
- ✓ The evidence is such that it could not have been discovered and produced for trial even with the exercise of reasonable diligence.
- ✓ The evidence is not cumulative.
- ✓ The evidence is such as to make a different result probable on retrial.
- ✓ The evidence is not simply an attempt to contradict or discredit a former witness.
- ✓ The evidence is the best evidence the case admits.

Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995) (citing *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)).

2. Test for Newly Discovered Evidence Based on Witness Recantation of Trial Testimony

If the motion is based on newly discovered evidence that a witness has recanted his or her trial testimony, the district court should grant the motion only if the following components are met:

- ✓ The court is satisfied that a material witness's trial testimony was false.
- ✓ The evidence showing that false testimony was introduced at trial is newly discovered.
- ✓ The evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence.
- ✓ It is probable that had the false testimony not been admitted, a different result would have occurred at trial.

Id. at 990, 901 P.2d at 627-28.

3. Juror Misconduct

The Nevada Supreme Court has not determined whether juror misconduct is "newly discovered evidence" for purposes of NRS 176.515.

VI. PETITION FOR A WRIT OF MANDAMUS

A. INTRODUCTION

The Nevada Constitution provides the district courts with jurisdiction to issue writs of mandamus. Nev. Const., art. 6, § 6. Inmates frequently file petitions for writs of mandamus. The threshold question in dealing with these petitions is whether there is another remedy available.

> **Note**: These materials do not address the technical requirements for a petition, the issuance of a writ, or the procedures that govern writ proceedings. *See* NRS 34.150–.310.

B. WHEN THE WRIT MAY ISSUE

The district court may issue a writ of mandamus "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." NRS 34.160. The Nevada Supreme Court has further recognized that while the writ may not generally be used to control a discretionary action, the writ of mandamus may be used to control an arbitrary or capricious exercise of discretion. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

The district court shall not issue a writ of mandamus when there is a "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. In the following examples mandamus will not lie because there is a plain, speedy, and adequate remedy at law:

- A challenge to the validity of the judgment of conviction and sentence must be raised on direct appeal, in a postconviction petition for a writ of habeas corpus, or in a motion that is incident to the trial court proceedings (discussed in sections II-V). NRS 34.724(2)(a), (b).
- A challenge to the computation of time served must be raised in a postconviction petition for a writ of habeas corpus. NRS 34.724(2)(c).
- A challenge to a prison disciplinary proceeding that did not result in the loss of statutory good time credits should be raised in a civil rights action.
- The district court has authority to issue a writ of mandamus directing an **inferior tribunal** to take action and therefore cannot consider a petition that seeks a writ directed at itself or another district court. *Jennett v. Stevens*, 33 Nev. 527, 530, 111 P. 1025, 1026 (1910) ("To permit the writ to [be issued by the district

court] in this case is to compel one district judge, in the exercise of a judicial duty, to be governed by the views of another district judge as to the construction of a statute, contrary to his own opinion of what that construction should be, a situation contrary to the principle of the law of *mandamus*, which presupposes a superior authority to command the doing of a particular act enjoined by law."); *see also* NRS 34.160; *EICON v. State Bd. of Exam'rs*, 117 Nev. 249, 252, 21 P.3d 628, 630 (2001) (stating that writ of mandamus is available to compel performance by an inferior tribunal).

C. FILING

A petition for a writ of mandamus should be filed in a separate, civil case because the petitioner is not permitted to raise claims challenging the validity of the judgment of conviction. If the petition was filed in the criminal case and the district court determines that the petition should be filed as a separate action, the district court should direct the clerk of the district court to docket the petition as a separate, civil matter. The filing of the petition in a criminal case should not be used as a basis to summarily deny the petition.

VII. PETITION FOR A WRIT OF CORAM NOBIS

The Nevada Supreme Court has recognized the availability of the common-law writ of coram nobis. *Trujillo v. State*, 129 Nev. 706, 716, 310 P.3d 594, 601 (2013).

A. WHEN AVAILABLE

The writ is available to a person who is not in custody on the conviction being challenged. *Trujillo*, 129 Nev. at 716, 310 P.3d at 601.

B. SCOPE OF THE WRIT

The writ may be used to address errors of fact outside the record that affect the validity and regularity of the decision itself and would have precluded the judgment from being entered. *Trujillo*, 129 Nev. at 717, 310 P.3d at 601.

- ✓ Errors must be factual, not legal.
- ✓ Facts must not have been known to the court at the time of the plea or trial.
- ✓ Facts must not have been withheld by the defendant.
- ✓ Facts must be of such a character that they would preclude entry of the judgment.
    - o Personal-jurisdiction-type errors or errors regarding the status of the party that would have prevented a judgment from being entered against the party.

For example, the competency of the defendant at the time of the plea or trial.

- Not newly discovered evidence as this is not a type of error that would preclude a valid judgment from being entered in the first place.

- Not available to litigate the guilt or innocence of the petitioner.

Trujillo, 129 Nev. at 717-18, 310 P.3d at 601-02.

VIII. MISCELLANEOUS PRO SE PETITIONS/MOTIONS

An incarcerated person, proceeding in pro se, may submit a document to the district court that is not labeled as any of the petitions or motions discussed in this guide or does not appear to be authorized by statute or case law. The key to resolving these motions is to discern the allegation for relief and to determine which recognized petition or motion the document is most like. A document that challenges the validity of the judgment of conviction that does not fit easily within any of the petitions or motions discussed in this guide should generally be construed as a postconviction petition for a writ of habeas corpus pursuant to the language in NRS 34.724(2)(b).

If the motion would be substantially deficient as a postconviction petition for a writ of habeas corpus, the district court may require the incarcerated person to cure the defects. *Miles v. State*, 120 Nev. 383, 387, 91 P.3d 588, 590 (2004).