

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY H. JOHNSON,
Appellant,
vs.
ROBERT LEGRAND, WARDEN,
Respondent.

No. 66476

FILED

MAR 11 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order dismissing a petition for post-conviction relief. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant, convicted of first-degree murder with the use of a deadly weapon and sentenced to two consecutive terms of life without the possibility of parole, filed a timely petition for post-conviction relief pursuant to former NRS 177.315 on March 27, 1989. 1987 Nev. Stat., ch. 539, § 39, at 1229. The district court appointed counsel to assist appellant in the post-conviction proceedings, but post-conviction counsel did not file a supplement to the petition.¹ 1987 Nev. Stat., ch. 539, § 43, at 1231. The State did not file an answer or a motion to dismiss despite the fact that former NRS 177.355(2), in pertinent part, required the State within 50 days after the filing of the petition to respond by answer or motion to dismiss. *Id.* Instead, on March 21, 1991, the district court entered an order directing the parties to proceed or to suffer dismissal within 30 days.

¹It appears that appellant's first post-conviction counsel withdrew from representation and new counsel substituted into the case in 1990. Neither counsel filed a supplement to the petition.

On April 23, 1991, appellant filed a pro se motion for leave to amend supplemental points and authorities. A day later, a motion to withdraw counsel was filed in the district court. On May 7, 1991, the district court entered an order granting a motion for leave to prepare brief. Appellant represents that in this order the district court allowed him to file no more than 50 pages of points and authorities, granted the request to withdraw as counsel, and cautioned appellant against representing himself.² Appellant then filed a motion to withdraw “pro-per representation and appointment of counsel” on June 18, 1992, indicating that he did not have the requisite skills to prepare a supplement to his petition. No action was taken on this motion by the district court.

No further action was taken in state court on the petition by either party or the district court until February 7, 2013, when appellant filed a motion for leave to file a second amended petition, a second amended petition, points and authorities, and motion for the appointment of counsel. The district court granted the motion for the appointment of counsel, and post-conviction counsel filed a supplement to the petition on May 28, 2014. The State then sought to dismiss the petition on the ground that the original petition had been dismissed in 1991 and the 2013 second amended petition would be untimely and successive. After appellant correctly pointed out that the original petition had not been dismissed in 1991, the State again sought to dismiss the petition because

²This document was not included in the appendix. However, appellant’s recitation of the contents of the order matches the district court’s account of the order. It does not appear that this order imposed a deadline for filing a supplement as neither the district court nor appellant mention a deadline.

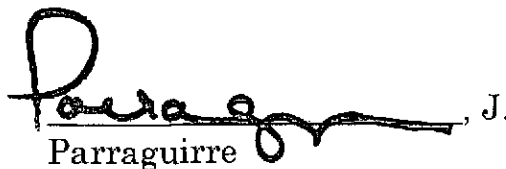
appellant had failed to take action to prosecute his petition for over two decades. The State further argued that the district court could dismiss the petition under the equitable doctrine of laches because there was an inexcusable delay, a knowing acquiescence to his condition, and prejudice to the State given the very lengthy delay. The district court determined that the equitable doctrine of laches should apply to appellant's decades-long delay in prosecuting his petition.

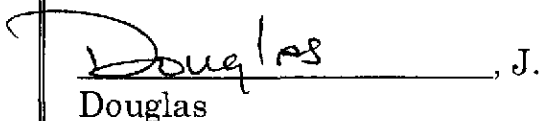
We conclude that the district court did not err in determining that the equitable doctrine of laches precludes consideration of appellant's petition. "Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008) (quoting *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997)). To determine whether a challenge is precluded by the equitable doctrine of laches, a court considers the following factors: (1) whether there is inexcusable delay, (2) whether the inexcusable delay constitutes acquiescence to the party's condition, and (3) whether the inexcusable delay is prejudicial to the other party. *See id.*

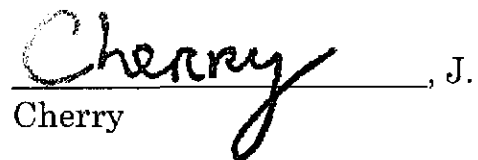
While it appears that the State failed to respond to the petition as required by former NRS 177.355(2), appellant's decades-long delay in filing a supplemental petition and challenge to the lack of resolution of his 1989 petition is unreasonable and inexcusable. Appellant is the one actor in the proceedings below who knew that his 1989 petition had not been resolved. In his 2013 pro se "second amended petition," appellant stated that he filed a petition for a writ of habeas corpus in federal court arguing that the State's "failure to answer petition for post-

conviction relief and delay in addressing the merits of the claims in the petition have prejudiced the petitioner's defense," and he further indicates that this petition was denied in 1994. The fact that the State failed in its obligation to file a response and the district court failed to take further action to ensure the timely prosecution of this petition do not absolve appellant's decision to wait two decades to bring forth this issue. Further, the circumstances of the delay and appellant's knowledge that the petition had not been resolved demonstrate his acquiescence, and we reject appellant's argument that he did not acquiesce because he believed he had prevailed when the State had not filed a response.³ Finally, we note that appellant failed to address or refute the allegation of prejudice to the State as a result of the decades-long delay. Having concluded that the district court did not err in dismissing the petition on the basis of laches,⁴ we

ORDER the judgment of the district court AFFIRMED.


Parraguirre, J.


Douglas, J.


Cherry, J.

³It defies reason that appellant would remain silent, imprisoned, for two decades believing that the State had conceded the validity of his claims challenging the judgment of conviction.

⁴Given our resolution of laches issue, we need not decide whether the claims in the 2013 amendment/supplements were new or related back to the original 1989 petition.

cc: Hon. Jerome Polaha, District Judge
Mary Lou Wilson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk