Nos. 80902 & 80907

IN THE NEVADA SUPREME COURT

Tyrone David James Sr.,

Petitioner-Appellant,

v.

State of Nevada/Brian Williams et. al.,

Respondents-Appellees.

On Appeal from the Order Denying Post-Conviction Petition
Requesting Genetic Marker Analysis (10C265506) &
Post-Conviction Petition for Writ of Habeas Corpus (A-19-797521-W)
Eighth Judicial District, Clark County
Honorable Ronald J. Israel, District Court Judge

Petitioner-Appellant's Appendix to the Opening Brief Volume IV of V

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CHRONOLOGICAL INDEX

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FILED UNDER SEAL

Dated this 28th day of September, 2020.

Respectfully submitted,

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 28, 2020. Electronic Service of the foregoing **Petitioner-Appellant's Appendix to the Opening Brief** shall be made in accordance with the Master Service List as follows:

James Sweetin, District Attorney

/s/ Adam Dunn
An Employee of the
Federal Public Defender, District of Nevada

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

TYRONE JAMES, SR., Plaintiff, vs. BRIAN WILLIAMS, Defendant.	CASE#: A-19-797521-W DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

MONDAY, JANUARY 13, 2020

RECORDER'S TRANSCRIPT OF HEARING

STATUS CHECK: STATUS OF STAY//RESET PETITION FOR WRIT

APPEARANCES:

For the Plaintiff: CB KIRSCHNER, ESQ.
Asst. Federal Public Defender

For the Defendant: JAMES SWEETIN, ESQ.
Chief Deputy District Attorney

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

Las Vegas, Nevada, Monday, January 13, 2020

[Case called at 9:14 a.m.]

THE COURT: This is the A case, 797521 and C2655 – 265506. Let's start with the petition for genetic markers.

Counsel, state your appearance.

MR. SWEETIN: James Sweetin for the State, Judge.

MS. KIRSCHNER: Good morning, Your Honor, CB Kirschner on behalf of Mr. James. He's incarcerated, not present. I'll waive his appearance today.

THE COURT: Can you waive it on this? I guess because it's, yeah, it's a habeas.

Okay, your petition. Do you have anything to add? I've read this a couple of times because –

MS. KIRSCHNER: I –

THE COURT: -- as you know, it's somewhat new to me.

MS. KIRSCHNER: Yes, Your Honor. I really don't have anything to add beyond my reply other than simply wanting to emphasize that the post conviction petition for writ of habeas corpus that we filed, we filed when we did just to avoid any future allegations of untimeliness. It's not otherwise relevant to the DNA petition which is governed by a separate statute. So based on that, at this point all we're asking for is that the testing be ordered. The results of that will determine what happens next, whether we move to reopen the petition for writ of habeas or file a

motion for a new trial. Those decisions would be made dependent on the results of the testing.

MR. SWEETIN: And, Judge, just in regards to the genetic testing, the State submits law –

THE COURT: Yeah, that's –

MR. SWEETIN: -- is clear. It shouldn't be – shouldn't be tested. And I'll tell you why. NRS 176.09183, it's clear that this further genetic testing is not appropriate in this case absent a showing of a reasonable possibility that one of two things happen, that the State would have not prosecuted this case had the evidence been available or that the defendant would not have been convicted had this evidence available. Defendant in no way can satisfy either of those and nothing in their briefs indicates anything otherwise. The testing in this case is irrelevant for either of these issues, the State would submit.

This case is not a whodunit. We have a 15-year-old victim who knew the defendant. He was her mother's boyfriend, had known him over an extended period of time. Even after the sexual assault, the same individual gave her a ride to school, asked her why she didn't like him, who she was going to tell at school. Even offered to get her a new cell phone case. This is, there's no doubt that this is the defendant in this case. This victim knew him, she testified this is who he is, she testified the circumstances surrounding it. There's no doubt that he is the guy. Now the evidence of the – and I would note that the evidence of the very similar conduct that was conducted by the same defendant on another victim previously, a 12-year-old victim, our victim in this case is

15-year-old, was also evidence that was available to the State before determination prosecution of this and currently in came in in the course of the trial. As the Court might know, in that case, the defendant was married to that victim's mother and the defendant, much like the victim in our case, used that relationship with both that victim's mother as well as his girlfriend who is the mother of the victim in this case to gain access to the child. The conduct in those cases, very, very similar. These two unrelated victims, the defendant spread the legs of both the victims. He digitally penetrated the victims. He rubbed his penis on the outer area of the vaginal opening of the – of these two victims and he used force to commit the sexual conduct with both of these victims.

This is not a whodunit, the State submits. There's no evidence that the defendant ejaculated on this victim, given. Because the evidence in this case that we have is that the victim rubbed his penis on the outside of the victim's vagina. Could that result in some sperm cells being deposited there? Yeah, possibly. But the absence of that sperm is no surprise. I've done these cases for years and years and to tell you the truth I don't of a case where I got sperm cells in similar circumstances. So that is no surprise. In fact, in regards to this DNA analysis, if there was DNA found there, that would be just monumentally horrible for the defendant in the proof of this case. However, if there's no DNA found, well that's explainable, as I've indicated.

It's really no surprise that in the course of this case that the defense wanted to go forward to trial and enforce their speedy trial right rather than have the DNA evidence tested. Because for this very reason.

If, in fact, his DNA was found there, it would be detrimental clearly to him. If it wasn't found, it really wouldn't give him that much access. It's undisputed that he knew about this DNA evidence as we're getting ready and went to trial. He even used or made reference to it in the course of the trial. He did not want this DNA evidence tested for that very reason because it has no moment. It's all inculpatory. It's not exculpatory to him in the least.

But if -- the bottom line is the defendant has not met the requirements of NRS 176.07187 [sic] to support the further DNA analysis or testing in this case. No matter what the result would be in that case, it would not have deterred the State from prosecuting the case and the State submits that likewise in both cases, there's not a reasonable possibility that it would have not have resulted in his conviction. The State submits that clearly the further testing should – the petition for further testing should be denied and we would submit it on that.

THE COURT: Counsel –

MS. KIRSCHNER: Your Honor –

THE COURT: -- let me, I had a question. Although he didn't raise it now, it's certainly in the pleadings and that is that the – that the testing or the use at time of trial is prohibited. So under the State statute. So how is it – and the Supreme Court's already decided that part of it.

MS. KIRSCHNER: Well, no, Your Honor, and I dispute very strongly the State's allegation on this point. This does not fall under rape shield evidence. The State has come up with a theory of which there's no evidence whatsoever that even though the victim told both sexual assault

authorities, law enforcement authorities, that she had not had consensual sex with anyone else for actually a year prior to this. They've now come up with this mystical person that she must have had consensual sex with the same morning she was assaulted by my client and that's where the sperm came from not, not my client. There's no evidence of that. All we have is the statement she made to authorities saying no, the only sexual contact she had was with my client. Now that we have a preliminary CODIS match matching DNA sperm fractions from the victim's sexual assault exam to someone other than my client, the State has come up with this theory that oh, this must have been consensual sex with someone else that no one ever knew about, was never disclosed prior to trial and therefore would be barred by rape shield. And frankly that theory is absurd, Your Honor.

This is not rape shield evidence. This is a sexual assault case and there is now presumptive DNA match to someone, a man other than my client, that would absolutely be admissible to show that the victim's either made a mistake or is falsifying her testimony about who assaulted her that morning.

THE COURT: Why did you say that it had to be that morning? I mean, if there's DNA evidence, it certainly could last for more – did I misunderstand you?

MS. KIRSCHNER: Well, Your Honor, I don't –

THE COURT: I mean it could be days, couldn't it?

MS. KIRSCHNER: I guess that would depend on --

THE COURT: I think that's what their argument is.

MS. KIRSCHNER: Well, she told the authorit – she –

THE COURT: I understand what she told and I'm just not sure how you could possibly get it in even if to somehow impeach her. That's my understanding what rape shield is, is to keep out prior sexual conduct because people are, you know, don't want to –

MS. KIRSCHNER: Well, and again, --

THE COURT: -- disclose that.

MS. KIRSCHNER: Perhaps, Your Honor, but that's not the evidence that we have in front of us is that maybe she had consensual sex several days prior, hadn't showered or bathed and that's why there were still sperm fractions found on her. But that, again, at this point is speculation.

THE COURT: All right.

MS. KIRSCHNER: All we have right now is her multiple statements saying, no, I haven't had consensual sex in the seven days leading up to this. In fact, I haven't had sex for the year leading up to this. That's the evidence that's in front of this Court. Based on that, if the only sexual contact she had was sexual assault, then DNA evidence linking that assault to someone other than my client is absolutely relevant. And as far as whether or not the jury was likely to convict, Your Honor, courts have recognized the incredible strength and compellingness of DNA evidence. The U.S. Supreme Court on down has recognized that it's virtually unassailable. So all we're asking for here is the test of it.

As far as Mr. Sweetin's argument that this case was unrelated to his prior similar case, the victims were unrelated. They actually knew

each other. The victim in this case knew a relative of the victim in the prior case and knew about those allegations. I'm not looking to retry the case today as far as whether or not that may have contributed to her false testimony. I'm not here to speculate. But if this isn't the case for testing to be done when we have a sexual assault where DNA evidence has now come back matching a different man, who still no one knows anything about, the State has not come forward and said this was the victim's boyfriend or something like that. Victim hasn't testified. All we know is she has said repeatedly I didn't have any other sex with anyone else. So the only assumption or inference at this point is that the sperm that was found belonged to the real assailant.

If as the DA said that DNA evidence ultimately would have inculpated my client, great. Let's get the testing and find out. I don't have any basis for that. I don't know how often a CODIS hit comes back matching one person and confirmation testing disputes that. I don't believe it happens that often. I've never seen it before. But this is the case for the testing. Then, if it comes back favorable to the defense, we will pursue most likely a motion for a new trial and we can debate then how strong this evidence is. But at this point, let's get it tested.

THE COURT: All right. Under NRS 176.0918, then especially if you go down to 2, excuse me, 3(e): a statement that the type of genetic marker analysis the petitioner is requesting was not available at the time of trial, or if it was available, that the failure to request genetic marker analysis before the petitioner was convicted was not a result of a strategic or tactical decision as part of the representation of the petitioner at trial.

Although that was again mentioned in the pleadings, you didn't, and I appreciate not repeating, but in any event, this genetic, the DNA was known at the time of trial. And so –

MS. KIRSCHNER: Your Honor, that's not correct.

THE COURT: Wait, wait, wait. Wait. I'm giving – I'm trying to give you –

MS. KIRSCHNER: I apologize.

THE COURT: -- my – you know, I have a limited, maybe I have a one-track mind. I let you argue back and forth. I'm trying to give you as detailed a decision as I can and, as I say all the time, if I'm wrong, you have remedies. I read this stuff thoroughly and although I don't write it out, which maybe I should, so then when you try, you know, now I – all right, in any event, this wasn't, there is no indication that this was anything other than an individual known to the victim. This was not the type of case where the allegations may prove that it was some – some unknown individual. And from everything I have read on the rape shield, et cetera, provided to me, and from the Supreme Court on this case, that the fact that the victim may have had other sexual conduct would not be admissible.

And, therefore, although I realize that the standard is very slight, it's the possibility, if there is no new evidence, meaning that this can't come in to show someone else, the – well, the statute, along with what I just quoted, preclude the testing. And therefore I'm denying the petition on that basis.

State, prepare a detailed order. Actually I think I told you

before I had one that was not detailed and of course they want that.

So, all right. And so as to the A case, I think that should, that basically, well I wouldn't say it makes it moot, it's still certainly a valid petition, but it's based on the DNA testing. Do you have anything you want to argue on that?

MS. KIRSCHNER: Yes, Your Honor, I would argue that that petition is not moot. That the claims are still valid based on the preliminary CODIS hit matching DNA from the victim to someone else, that the allegations are still valid. I don't know if Your Honor wants additional briefing before making a decision.

THE COURT: Well you raised the ineffective assistance. I – and the due process, et cetera, so certainly you can go ahead and address those, if you'd like to.

MS. KIRSCHNER: Yes, Your Honor. Sorry.

THE COURT: Page 15 of your brief talks about the ineffective assistance for not testing the DNA.

MS. KIRSCHNER: Yes, Your Honor, and my understanding at the time is that it wasn't exactly known whether or not there was DNA that was recovered which is why defense counsel simply accepted that and allowed that to be represented to the jury. And it turns out that he made that representation and allowed for the DNA to go untested based on an inaccurate assumption that we know now that there was DNA that was recovered which should have been tested. My client told his attorney that he wanted it to be tested. He told the police that he wanted it to be tested. And since we now know that it matched someone else, that certainly

would constitute ineffective assistance of counsel.

I would also argue under Claim 2 that the DNA evidence matching or presumptively matching another person is evidence of actual innocence. I would continue to argue under Claim 3 that the existence of this exculpatory material was a violation of due process and a violation of the discovery laws for not telling us both about the existence of the DNA evidence as well as apparently now we have reason, the DA has represented that the victim had consensual sex within days leading up to this incident. I believe that is relevant despite rape shield laws. One, it showed that the victim was being untruthful to the sexual assault nurse. Untruthful when she testified at trial, but more importantly, there was testimony offered by the sexual assault nurse in this case that there was redness that she observed to the victim's vagina during the exam. Now that was proffered as a possible result of the sexual assault. If the victim had last had sex so recently that there was still sperm fractions on her vagina, then it would be equally possible that the redness and swelling observed during that exam was also the result of consensual sex and not sexual assault. That's information that was not known to the defense and therefore not able to be argued, but it turns out that testimony was incorrect and Mr. James did not have the opportunity to cross examine on it.

So with or without the DNA testing, there is still evidence of multiple due process violations and sixth amendment violations in this case, I would ask that that petition be granted.

MR. SWEETIN: And the State submits there is no reason to

grant this petition. Clearly to start off with, it's time barred. In this particular case, we have an 8-year lag, I think, from the time of the remittitur until the time that this is filed. We have an appeal that was filed, we have a post conviction proceeding that was had, and the time period to which to file this has long since ran. Besides the fact, it's successive to a prior post conviction petition that's already gone up to the Supreme Court and been affirmed. The issue in regards to the DNA was always known to all the parties. There was a sexual assault kit that was provided by – or generated by the victim's examination in this case. That was known to all parties before trial, during trial, after trial, through the appeal, through the post conviction process. Through none of those process was it ever challenged that defense counsel was in any way ineffective for not requesting that particular item to be examined.

What defense counsel is trying to – they're trying to jump to other arguments beyond what this writ has. And they're not good arguments that they have, to say the least, but at any rate, the one thing before this Court, however, is the claims of post conviction and that's the ineffective assistance of counsel. Time barred. There's no doubt. There's no good cause that has been shown, not even proffered. There's no good cause, it's time barred. Beyond that for the reasons that I've already argued, the State would submit that clearly on its face as trial was – before trial, it was clear that in fact everybody knew about the sexual assault kit and in fact took actions to prevent it from being tested before this case actually went to trial. The speedy trial right was invoked, would not be waived. And for that reason, the State did not have enough

time to test this. But for that particular issue, it would have been tested. And the State submits clearly for the reasons I laid out before, that was probably pretty good strategic reason. If in fact the defense thought that that might be, that sexual assault kit might provide the defendant's DNA, that would be devastating to his case. And if his DNA was not there, the State submits that is something that certainly could be explained. So the State would submit that it's barred, it's time barred and there's no evidence or any indication that's been shown that counsel's been ineffective in regards to an innocence claim in this case, or due process claim.

The State submits that for all the reasons that we've already discussed, there is no reason to believe that this DNA evidence was dispositive in regards the identification of a known assailant to the victim. For those reasons, the State submits that the writ should be denied. We'd submit it on that.

THE COURT: Thank you. Tell me why and you didn't bring it up and I certainly understand, why it's not time barred when they discussed a rape kit several, several times. It was known years and years ago and the fact that it wasn't tested and it's – it's an interesting theory, I think you're sort of arguing that the State, even after trial, should have tested it or something to that affect because otherwise it does seem to be time barred.

MS. KIRSCHNER: Yes, Your Honor. First of all, I would note that there's a difference between knowing that there's a rape kit in existence and knowing that DNA material was recovered from it.

Everyone knew there was a rape kit conducted. I've spoken with defense counsel, I've made representations in my petition about trial counsel and what he said. Happy to call him if this court wants to grant a hearing, but he said he did not know there was DNA that was found as a result of the rape kit. Everyone probably assumed, --

THE COURT: Well, how could possibly --

MS. KIRSCHNER: -- like Mr. Sweetin did.

THE COURT: -- know that until it's tested. And they knew it wasn't going to be tested. That – all right.

MS. KIRSCHNER: Your Honor, I think there was confusion about whether or not there had been any preliminary testing or if there was anything to test. Again, you know, --

THE COURT: All right.

MS. KIRSCHNER: -- we can have a hearing –

THE COURT: Thank you.

MS. KIRSCHNER: -- on this. But as far as time bar, Your Honor, new evidence of actual innocence overcomes the time bar. This petition was filed within one year of the defense learning about the presumptive CODIS match to another individual. The purpose is of *Schlup* and actual innocence to overcome time bar. It doesn't matter whether or not everyone knew there was a rape kit years and years ago. New evidence was turned over to the defense within a year of this petition being filed showing the presumptive CODIS match to another individual other than Mr. James. Under *Schlup* standard which has been adopted by the Nevada Supreme Court that is still newly presented evidence of

actual innocence and sufficient to overcome the time bar and again the petition was timely filed under *Rippo* because it was filed within one year of the discovery of that evidence by the defense.

THE COURT: All right. Thank you. Well, you know what? I did not read that because I'm not sure you even. Where is that Schlep case?

MS. KIRSCHNER: *Schlup*, Your Honor.

THE COURT: Okay. Because I read most of these if you have a case that you didn't cite, I'll read it. What's the cite?

MS. KIRSCHNER: Your Honor, it's on page 9 of my –

THE COURT: Is it?

MS. KIRSCHNER: -- brief regarding the actual –

THE COURT: All right. Then --

MS. KIRSCHNER: -- innocence determination. And the case in which the Nevada Supreme Court adopted it is *Mitchell versus State*, also cited on that page.

THE COURT: Sorry, page 9 of your brief?

MS. KIRSCHNER: Of the petition.

THE COURT: All right. I'm going to read that. I did not. And I will have a decision in two weeks.

MR. SWEETIN: Thank you, Judge.

THE CLERK: That'll be January 27th at 9 a.m.

MS. KIRSCHNER: Your Honor, I might need to be up in Reno on another –

THE COURT: Oh, I'm going to do an order –

MS. KIRSCHNER: That's fine.

THE COURT: -- and, I mean, yeah, and I'll – so it's, I'm going to do an order and it'll be done in two weeks.

MS. KIRSCHNER: That's fine.

MR. SWEETIN: Thank you.

THE COURT: A decision in order.

THE CLERK: Do you have a chambers calendar?

THE COURT: What?

THE CLERK: You want it on chambers?

THE COURT: Chambers, yeah. There's no reason for you guys to.

[Hearing concluded at 9:40 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Judy Chappell

Judy Chappell
Court Recorder/Transcriber

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STATE OF NEVADA, Plaintiff, vs. TYRONE D. JAMES, Defendant.	CASE#: 10C265506 DEPT. XXVIII

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APPEARANCES:

For the State: JAMES SWEETIN, ESQ.
Chief Deputy District Attorney

For the Defendant: CB KIRSCHNER, ESQ.
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RECORDED BY: JUDY CHAPPELL, COURT RECORDER

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Counsel, state your appearance.

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Okay, your petition. Do you have anything to add? I've read this a couple of times because –

MS. KIRSCHNER: I –

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MS. KIRSCHNER: Yes, Your Honor. I really don't have anything to add beyond my reply other than simply wanting to emphasize that the post conviction petition for writ of habeas corpus that we filed, we filed when we did just to avoid any future allegations of untimeliness. It's not otherwise relevant to the DNA petition which is governed by a separate statute. So based on that, at this point all we're asking for is that the testing be ordered. The results of that will determine what happens next, whether we move to reopen the petition for writ of habeas or file a

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This case is not a whodunit. We have a 15-year-old victim who knew the defendant. He was her mother's boyfriend, had known him over an extended period of time. Even after the sexual assault, the same individual gave her a ride to school, asked her why she didn't like him, who she was going to tell at school. Even offered to get her a new cell phone case. This is, there's no doubt that this is the defendant in this case. This victim knew him, she testified this is who he is, she testified the circumstances surrounding it. There's no doubt that he is the guy. Now the evidence of the – and I would note that the evidence of the very similar conduct that was conducted by the same defendant on another victim previously, a 12-year-old victim, our victim in this case is

15-year-old, was also evidence that was available to the State before determination prosecution of this and currently in came in in the course of the trial. As the Court might know, in that case, the defendant was married to that victim's mother and the defendant, much like the victim in our case, used that relationship with both that victim's mother as well as his girlfriend who is the mother of the victim in this case to gain access to the child. The conduct in those cases, very, very similar. These two unrelated victims, the defendant spread the legs of both the victims. He digitally penetrated the victims. He rubbed his penis on the outer area of the vaginal opening of the – of these two victims and he used force to commit the sexual conduct with both of these victims.

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If, in fact, his DNA was found there, it would be detrimental clearly to him. If it wasn't found, it really wouldn't give him that much access. It's undisputed that he knew about this DNA evidence as we're getting ready and went to trial. He even used or made reference to it in the course of the trial. He did not want this DNA evidence tested for that very reason because it has no moment. It's all inculpatory. It's not exculpatory to him in the least.

But if -- the bottom line is the defendant has not met the requirements of NRS 176.07187 [sic] to support the further DNA analysis or testing in this case. No matter what the result would be in that case, it would not have deterred the State from prosecuting the case and the State submits that likewise in both cases, there's not a reasonable possibility that it would have not have resulted in his conviction. The State submits that clearly the further testing should – the petition for further testing should be denied and we would submit it on that.

THE COURT: Counsel –

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This is not rape shield evidence. This is a sexual assault case and there is now presumptive DNA match to someone, a man other than my client, that would absolutely be admissible to show that the victim's either made a mistake or is falsifying her testimony about who assaulted her that morning.

THE COURT: Why did you say that it had to be that morning? I mean, if there's DNA evidence, it certainly could last for more – did I misunderstand you?

MS. KIRSCHNER: Well, Your Honor, I don't –

THE COURT: I mean it could be days, couldn't it?

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THE COURT: I think that's what their argument is.

MS. KIRSCHNER: Well, she told the authorit – she –

THE COURT: I understand what she told and I'm just not sure how you could possibly get it in even if to somehow impeach her. That's my understanding what rape shield is, is to keep out prior sexual conduct because people are, you know, don't want to –

MS. KIRSCHNER: Well, and again, --

THE COURT: -- disclose that.

MS. KIRSCHNER: Perhaps, Your Honor, but that's not the evidence that we have in front of us is that maybe she had consensual sex several days prior, hadn't showered or bathed and that's why there were still sperm fractions found on her. But that, again, at this point is speculation.

THE COURT: All right.

MS. KIRSCHNER: All we have right now is her multiple statements saying, no, I haven't had consensual sex in the seven days leading up to this. In fact, I haven't had sex for the year leading up to this. That's the evidence that's in front of this Court. Based on that, if the only sexual contact she had was sexual assault, then DNA evidence linking that assault to someone other than my client is absolutely relevant. And as far as whether or not the jury was likely to convict, Your Honor, courts have recognized the incredible strength and compellingness of DNA evidence. The U.S. Supreme Court on down has recognized that it's virtually unassailable. So all we're asking for here is the test of it.

As far as Mr. Sweetin's argument that this case was unrelated to his prior similar case, the victims were unrelated. They actually knew

each other. The victim in this case knew a relative of the victim in the prior case and knew about those allegations. I'm not looking to retry the case today as far as whether or not that may have contributed to her false testimony. I'm not here to speculate. But if this isn't the case for testing to be done when we have a sexual assault where DNA evidence has now come back matching a different man, who still no one knows anything about, the State has not come forward and said this was the victim's boyfriend or something like that. Victim hasn't testified. All we know is she has said repeatedly I didn't have any other sex with anyone else. So the only assumption or inference at this point is that the sperm that was found belonged to the real assailant.

If as the DA said that DNA evidence ultimately would have inculpated my client, great. Let's get the testing and find out. I don't have any basis for that. I don't know how often a CODIS hit comes back matching one person and confirmation testing disputes that. I don't believe it happens that often. I've never seen it before. But this is the case for the testing. Then, if it comes back favorable to the defense, we will pursue most likely a motion for a new trial and we can debate then how strong this evidence is. But at this point, let's get it tested.

THE COURT: All right. Under NRS 176.0918, then especially if you go down to 2, excuse me, 3(e): a statement that the type of genetic marker analysis the petitioner is requesting was not available at the time of trial, or if it was available, that the failure to request genetic marker analysis before the petitioner was convicted was not a result of a strategic or tactical decision as part of the representation of the petitioner at trial.

Although that was again mentioned in the pleadings, you didn't, and I appreciate not repeating, but in any event, this genetic, the DNA was known at the time of trial. And so –

MS. KIRSCHNER: Your Honor, that's not correct.

THE COURT: Wait, wait, wait. Wait. I'm giving – I'm trying to give you –

MS. KIRSCHNER: I apologize.

THE COURT: -- my – you know, I have a limited, maybe I have a one-track mind. I let you argue back and forth. I'm trying to give you as detailed a decision as I can and, as I say all the time, if I'm wrong, you have remedies. I read this stuff thoroughly and although I don't write it out, which maybe I should, so then when you try, you know, now I – all right, in any event, this wasn't, there is no indication that this was anything other than an individual known to the victim. This was not the type of case where the allegations may prove that it was some – some unknown individual. And from everything I have read on the rape shield, et cetera, provided to me, and from the Supreme Court on this case, that the fact that the victim may have had other sexual conduct would not be admissible.

And, therefore, although I realize that the standard is very slight, it's the possibility, if there is no new evidence, meaning that this can't come in to show someone else, the – well, the statute, along with what I just quoted, preclude the testing. And therefore I'm denying the petition on that basis.

State, prepare a detailed order. Actually I think I told you

before I had one that was not detailed and of course they want that.

So, all right. And so as to the A case, I think that should, that basically, well I wouldn't say it makes it moot, it's still certainly a valid petition, but it's based on the DNA testing. Do you have anything you want to argue on that?

MS. KIRSCHNER: Yes, Your Honor, I would argue that that petition is not moot. That the claims are still valid based on the preliminary CODIS hit matching DNA from the victim to someone else, that the allegations are still valid. I don't know if Your Honor wants additional briefing before making a decision.

THE COURT: Well you raised the ineffective assistance. I – and the due process, et cetera, so certainly you can go ahead and address those, if you'd like to.

MS. KIRSCHNER: Yes, Your Honor. Sorry.

THE COURT: Page 15 of your brief talks about the ineffective assistance for not testing the DNA.

MS. KIRSCHNER: Yes, Your Honor, and my understanding at the time is that it wasn't exactly known whether or not there was DNA that was recovered which is why defense counsel simply accepted that and allowed that to be represented to the jury. And it turns out that he made that representation and allowed for the DNA to go untested based on an inaccurate assumption that we know now that there was DNA that was recovered which should have been tested. My client told his attorney that he wanted it to be tested. He told the police that he wanted it to be tested. And since we now know that it matched someone else, that certainly

would constitute ineffective assistance of counsel.

I would also argue under Claim 2 that the DNA evidence matching or presumptively matching another person is evidence of actual innocence. I would continue to argue under Claim 3 that the existence of this exculpatory material was a violation of due process and a violation of the discovery laws for not telling us both about the existence of the DNA evidence as well as apparently now we have reason, the DA has represented that the victim had consensual sex within days leading up to this incident. I believe that is relevant despite rape shield laws. One, it showed that the victim was being untruthful to the sexual assault nurse. Untruthful when she testified at trial, but more importantly, there was testimony offered by the sexual assault nurse in this case that there was redness that she observed to the victim's vagina during the exam. Now that was proffered as a possible result of the sexual assault. If the victim had last had sex so recently that there was still sperm fractions on her vagina, then it would be equally possible that the redness and swelling observed during that exam was also the result of consensual sex and not sexual assault. That's information that was not known to the defense and therefore not able to be argued, but it turns out that testimony was incorrect and Mr. James did not have the opportunity to cross examine on it.

So with or without the DNA testing, there is still evidence of multiple due process violations and sixth amendment violations in this case, I would ask that that petition be granted.

MR. SWEETIN: And the State submits there is no reason to

grant this petition. Clearly to start off with, it's time barred. In this particular case, we have an 8-year lag, I think, from the time of the remittitur until the time that this is filed. We have an appeal that was filed, we have a post conviction proceeding that was had, and the time period to which to file this has long since ran. Besides the fact, it's successive to a prior post conviction petition that's already gone up to the Supreme Court and been affirmed. The issue in regards to the DNA was always known to all the parties. There was a sexual assault kit that was provided by – or generated by the victim's examination in this case. That was known to all parties before trial, during trial, after trial, through the appeal, through the post conviction process. Through none of those process was it ever challenged that defense counsel was in any way ineffective for not requesting that particular item to be examined.

What defense counsel is trying to – they're trying to jump to other arguments beyond what this writ has. And they're not good arguments that they have, to say the least, but at any rate, the one thing before this Court, however, is the claims of post conviction and that's the ineffective assistance of counsel. Time barred. There's no doubt. There's no good cause that has been shown, not even proffered. There's no good cause, it's time barred. Beyond that for the reasons that I've already argued, the State would submit that clearly on its face as trial was – before trial, it was clear that in fact everybody knew about the sexual assault kit and in fact took actions to prevent it from being tested before this case actually went to trial. The speedy trial right was invoked, would not be waived. And for that reason, the State did not have enough

time to test this. But for that particular issue, it would have been tested. And the State submits clearly for the reasons I laid out before, that was probably pretty good strategic reason. If in fact the defense thought that that might be, that sexual assault kit might provide the defendant's DNA, that would be devastating to his case. And if his DNA was not there, the State submits that is something that certainly could be explained. So the State would submit that it's barred, it's time barred and there's no evidence or any indication that's been shown that counsel's been ineffective in regards to an innocence claim in this case, or due process claim.

The State submits that for all the reasons that we've already discussed, there is no reason to believe that this DNA evidence was dispositive in regards the identification of a known assailant to the victim. For those reasons, the State submits that the writ should be denied. We'd submit it on that.

THE COURT: Thank you. Tell me why and you didn't bring it up and I certainly understand, why it's not time barred when they discussed a rape kit several, several times. It was known years and years ago and the fact that it wasn't tested and it's – it's an interesting theory, I think you're sort of arguing that the State, even after trial, should have tested it or something to that affect because otherwise it does seem to be time barred.

MS. KIRSCHNER: Yes, Your Honor. First of all, I would note that there's a difference between knowing that there's a rape kit in existence and knowing that DNA material was recovered from it.

Everyone knew there was a rape kit conducted. I've spoken with defense counsel, I've made representations in my petition about trial counsel and what he said. Happy to call him if this court wants to grant a hearing, but he said he did not know there was DNA that was found as a result of the rape kit. Everyone probably assumed, --

THE COURT: Well, how could possibly --

MS. KIRSCHNER: -- like Mr. Sweetin did.

THE COURT: -- know that until it's tested. And they knew it wasn't going to be tested. That – all right.

MS. KIRSCHNER: Your Honor, I think there was confusion about whether or not there had been any preliminary testing or if there was anything to test. Again, you know, --

THE COURT: All right.

MS. KIRSCHNER: -- we can have a hearing –

THE COURT: Thank you.

MS. KIRSCHNER: -- on this. But as far as time bar, Your Honor, new evidence of actual innocence overcomes the time bar. This petition was filed within one year of the defense learning about the presumptive CODIS match to another individual. The purpose is of *Schlup* and actual innocence to overcome time bar. It doesn't matter whether or not everyone knew there was a rape kit years and years ago. New evidence was turned over to the defense within a year of this petition being filed showing the presumptive CODIS match to another individual other than Mr. James. Under *Schlup* standard which has been adopted by the Nevada Supreme Court that is still newly presented evidence of

actual innocence and sufficient to overcome the time bar and again the petition was timely filed under *Rippo* because it was filed within one year of the discovery of that evidence by the defense.

THE COURT: All right. Thank you. Well, you know what? I did not read that because I'm not sure you even. Where is that Schlep case?

MS. KIRSCHNER: *Schlup*, Your Honor.

THE COURT: Okay. Because I read most of these if you have a case that you didn't cite, I'll read it. What's the cite?

MS. KIRSCHNER: Your Honor, it's on page 9 of my –

THE COURT: Is it?

MS. KIRSCHNER: -- brief regarding the actual –

THE COURT: All right. Then --

MS. KIRSCHNER: -- innocence determination. And the case in which the Nevada Supreme Court adopted it is *Mitchell versus State*, also cited on that page.

THE COURT: Sorry, page 9 of your brief?

MS. KIRSCHNER: Of the petition.

THE COURT: All right. I'm going to read that. I did not. And I will have a decision in two weeks.

MR. SWEETIN: Thank you, Judge.

THE CLERK: That'll be January 27th at 9 a.m.

MS. KIRSCHNER: Your Honor, I might need to be up in Reno on another –

THE COURT: Oh, I'm going to do an order –

MS. KIRSCHNER: That's fine.

THE COURT: -- and, I mean, yeah, and I'll – so it's, I'm going to do an order and it'll be done in two weeks.

MS. KIRSCHNER: That's fine.

MR. SWEETIN: Thank you.

THE COURT: A decision in order.

THE CLERK: Do you have a chambers calendar?

THE COURT: What?

THE CLERK: You want it on chambers?

THE COURT: Chambers, yeah. There's no reason for you guys to.

[Hearing concluded at 9:40 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Judy Chappell

Judy Chappell
Court Recorder/Transcriber

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**January 16, 2020**

A-19-797521-W Tyrone James, Sr., Plaintiff(s)
vs.
Brian Williams, Defendant(s)

January 16, 2020	**Chambers**	**All Pending Motions**	**All Pending Motions (01/16/2020)**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas

PARTIES
PRESENT: None

JOURNAL ENTRIES

- DECISION...PETITION OF WRIT OF HABEAS CORPUS

Matter Advanced. Court review papers and pleadings;
On June 27, 2019, Petitioner James Tyrone filed a Petition for Habeas Corpus. The State responded on August 6, 2019. At the hearing on January 13, 2020, this Court denied Mr. Tyrone's Petition for Genetic Marker Testing. The Court continued the instant petition for decision in chambers. At issue is whether the instant petition is procedurally barred and whether there is good cause to overcome the procedural bar so that the petition may be addressed on the merits.
The Court finds that the petition is procedurally barred and Petitioner cannot demonstrate good cause to overcome the procedural bar. Under NRS 34.726, a petition that challenges the validity of a conviction must be filed within one year of the entry of judgment of conviction, or if an appeal has been taken from the judgment, within one year after the Supreme Court issues remittitur. Here, the Supreme Court issued the remittitur from Petitioner's direct appeal on February 9, 2011. Thus, the petition is time barred because Petitioner had until February 9, 2012 to file a petition for habeas corpus but did not file this petition until June 27, 2019, more than seven years later. Moreover, the petition is barred as successive under NRS 34.810(2) because this is Petitioner's second petition and it raises only new and different grounds that could have been raised at an earlier time.
Petitioner claims that he can overcome any procedural because he maintains he is actually innocent of the crimes for which he was convicted. Nevada has adopted the federal standard for determining whether petitioner has made a sufficient showing of actual innocence See Mitchell v. State, 122 Nev.

1269, 1273 -74. The U.S. Supreme Court has established that for a petitioner's actual innocence to overcome a procedural bar, the petitioner must show "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup v. Delo, 513 U.S. 298, 327 (1995).
Here, the Petitioner has not met the standard set out in Schlup because he cannot show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. The new evidence in this case is a CODIS hit which possibly shows that another man's DNA was found in the victim's rape kit. The Court finds that, in light of the CODIS hit, it is not more likely than not that no reasonable juror would have convicted Petitioner because this is not an identity case. The victim in this case knew the Petitioner because Petitioner was dating the victim s mother. Furthermore, the Nevada Supreme Court held that the victim's testimony and the State's evidence at the time of the jury trial was sufficient evidence to find the Petitioner guilty beyond a reasonable doubt. Thus, the Petitioner cannot show actual innocence to overcome any procedural bars to his petition.
Additionally, even if the petition was not procedurally barred, the Petitioner cannot show that his trial counsel was ineffective, To prevail on an ineffective assistance of counsel claim, the Petitioner must show: (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel s errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Petitioner asserts that his trial counsel was ineffective for not testing the DNA from the victim's rape kit. However, this evidence has been available for years and defense counsel was aware of the availability of the rape kit. Despite knowing about the rape kit, trial counsel chose not to have the evidence analyzed for trial, perhaps as a strategic decision or because Petitioner had invoked his right to a speedy trial. Therefore, this Court finds that Petitioner's trial counsel was not ineffective because his representations did not fall below an objective standard of reasonableness.
Accordingly, the Petitioner's Writ of Habeas Corpus is DENIED. State to prepare a detailed order with findings of fact and conclusions of law.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: James Sweetin, Esq. (DA) and Courtney B. Kirschner, Esq. (Federal Public Defender). kt 01/16/2020.

ORIGINAL

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TYRONE JAMES,
#1303556

Defendant.

CASE NO: **A-19-797521-W**
10C265506

DEPT NO: **XXVIII**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: **JANUARY 13, 2020**
TIME OF HEARING: **9:00 AM**

This cause having presented before the Honorable RONALD J. ISRAEL, District Judge, on January 13, 2020; Petitioner being represented by COURTNEY KIRSCHNER, ESQ.; Respondent being represented by STEVEN B. WOLFSON, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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☐ Voluntary Dismissal	■ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ Judgment of Arbitration

STATEMENT OF THE CASE

On June 23, 2010, Tyrone D. James (hereinafter "Petitioner") was charged by way of Information with two counts of Sexual Assault With a Minor Under Sixteen Years of Age (Category A Felony - NRS 200.364, 200.366); two counts of Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210); and one count of Battery with Intent to Commit a Crime (Category A Felony – NRS 200.400).

On August 16, 2010, the State filed a Motion to Admit Evidence of Other Crimes, Wrongs or Acts. On August 25, 2010, Petitioner filed his Opposition. On September 8, 2010, Petitioner filed a Motion in Limine to Preclude Lay Opinion Testimony that the Complaining Witness' Behavior is Consistent with that of a Victim of Sexual Abuse. On September 10, 2010, the State filed its Opposition in open court. This Court conducted a Petrocelli hearing regarding the State's bad acts motion. Ultimately, the Court granted both the State's bad acts motion and Petitioner's motion in limine. On September 17, 2010, Petitioner filed a Motion to Reconsider Motion to Admit Evidence of Other Crimes, Wrongs or Acts. This Court denied Petitioner's Motion on September 21, 2010.

Petitioner's jury trial commenced on September 21, 2010. On September 23, 2010, the jury found Petitioner guilty on all counts.

On January 19, 2011, Petitioner was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – to a maximum term of life with a minimum parole eligibility after 25 years; as to Count 3 – to a maximum term of life with a minimum parole eligibility after 25 years, concurrent with Count 1; as to Count 5 – to a maximum term of Life with a minimum parole eligibility after 2 years, concurrent with Counts 1 and 3. The Court further ordered a sentence of lifetime supervision to be imposed upon Petitioner's release from any term of probation, parole, or imprisonment. Petitioner received 250 days credit for time served. The Court dismissed Counts 2 and 4, as they were lesser-included offenses of Counts 1 and 3. Judgment of Conviction was filed February 9, 2011.

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On March 7, 2011, Petitioner filed a Notice of Appeal. On October 31, 2012, the Nevada Supreme Court issued an Order of Affirmance. Remittitur issued on November 26, 2012.

On March 14, 2013, Petitioner filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition") and Motion to Appoint Counsel. The State filed its Response on May 7, 2013. On May 20, 2013, Robert Langford Esq., was appointed as post-conviction counsel. On September 4, 2015, Petitioner filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplement to First Petition"). On January 15, 2016, Petitioner filed another Supplement to Supplemental Petition for Writ of Habeas Corpus ("Second Supplement to First Petition"). On April 21, 2016, the State filed its Response to both Supplements. On October 3, 2016, this Court held an evidentiary hearing and heard sworn testimony from Bryan Cox, Esq., and Dr. Joyce Adams. On November 8, 2016, this Court entered its Findings of Fact, Conclusions of Law, and Order, denying the First Petition.

On December 8, 2016, Petitioner filed a Notice of Appeal. The Nevada Court of Appeals affirmed the denial on November 14, 2017. Remittitur issued December 29, 2017.

Petitioner filed another Petition for Writ of Habeas Corpus (Post-Conviction) ("Second Petition") on June 27, 2019. The State filed its Response to the Second Petition on August 6, 2019.

Petitioner filed a Post-Conviction Petition Requesting A Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada (NRS 176.0918) ("Genetic Marker Petition") on July 16, 2019. The State filed its Response on July 23, 2019. This Court heard the Petition on July 29, 2019, but continued it. On August 8, 2019, this Court signed an Order requiring the Las Vegas Metropolitan Police Department and Bode Cellmark Forensics Laboratory to preserve all evidence in this case, and, within ninety (90) days, to prepare an inventory thereof and submit a copy of that inventory to the defense, the State, and this Court. On January 13, 2020, the Court denied Petitioner's Petition for Genetic Testing.

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Petitioner submitted a Motion for Stay of his Second Petition on August 8, 2019, based on the DNA testing. On August 19, 2019, this Court heard the Second Petition, noting the Motion for Stay and setting a briefing schedule. The State filed its Response on September 4, 2019. On September 10, 2019, Petitioner filed a Reply. On September 25, 2019, the Court granted Petitioner's Motion. On November 25, 2019, the Court reset the briefing schedule on the Second Petition and set the matter for argument.

On January 13, 2020, the Court held a hearing and took the matter under advisement. The Court now rules as follows:

ANALYSIS

I. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.

a. Petitioner's claims are untimely

Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

In the instant case, the Judgment of Conviction was filed on February 9, 2011, and Petitioner filed a direct appeal. On October 31, 2012, the Nevada Supreme Court affirmed the Judgment of Conviction and remittitur issued on November 26, 2012. Thus, the one-year time bar began to run from this date. The instant Second Petition was not filed until June 27, 2019. This is over seven and a half years after remittitur issued on Petitioner's direct appeal and in is excess of the one-year time frame. Absent a showing of good cause for this delay and undue prejudice, Petition's claim shall be dismissed because of its tardy filing.

b. Petitioner's claims are successive.

Petitioner's Second Petition is procedurally barred because it is successive. NRS 34.810(2) reads:

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

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(emphasis added). Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, as discussed *supra*, this is Petitioner's Second Petition. Petitioner does not deny that it is successive. Second Petition at 3–6. It raises only new and different grounds that could and should have been raised at an earlier, appropriate time. NRS 34.810(2). Accordingly, this Second Petition is an abuse of the writ, procedurally barred, and shall be denied absent a showing of good cause and prejudice. NRS 34.810(3).

II. PETITIONER HAS NOT DEMONSTRATED GOOD CAUSE TO OVERCOME THE PROCEDURAL BAR.

A showing of good cause and prejudice may overcome procedural bars. "To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default.*" Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court

continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Petitioner claimed he could show good cause in the form of "new evidence" that he alleges supports his actual innocence and Brady claims. Second Petition at 11. However, as discussed *infra*, these claims are meritless. Further, because his substantive claims are meritless, Petitioner cannot demonstrate prejudice and his Second Petition is thereby denied.

a. There was no ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323

(1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices

between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant

part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Here, Petitoner alleged his counsel was ineffective for not testing the DNA from the rape kit of the victim, T.H. Second Petition at 15. As an initial matter, any claim that trial counsel should have had the DNA tested has been available for years and so is itself time barred; accordingly, it cannot provide good cause to overcome the procedural bars. Riker, 121 Nev. at 235, 112 P.3d at 1077. Regardless, the claims of ineffectiveness are without merit.

Petitioner argued trial counsel did not know there had been DNA collected from the victim's rape kit. Second Petition at 10. However, this is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. In fact, Detective Daniel Tomaino testified at trial that a rape kit had been collected. Transcript, Jury Trial ("JTT") Day 1, at 252–53. Defense counsel actually cross-examined Det. Tomaino regarding the rape kit. Id. at 267–68, 276. Dr. Theresa Vergara also testified as to the details of the sexual assault examination, including the swabs of the victim's genitalia collected as part of the rape kit. JTT, Day 2 at 150, 154–58. Indeed, as the First Petition made clear, previous counsel—including trial counsel and post-conviction counsel—actually knew Petitioner's DNA was *not* found on the victim. See Supplement to First Petition, September 4, 2015, at 5–6; JTT, Day 1 at 276–77.

It was not an objectively unreasonable strategy to refrain from having the DNA tested. First, given that Petitioner consistently maintained his innocence, had a test revealed that Petitone was lying, his defense would have been severely undermined. This strategic call cannot be evaluated through the benefit of hindsight, knowing that there is now a potential CODIS hit regarding T.H.'s rape kit. Counsel could not have known there was no match to Petitioner unless and until such a test were completed, and the potential risk of having such a test was high. Moreover, Petitioner invoked his right to a speedy trial. Recorder's Transcript of Hearing RE: Arraignment, June 24, 2010, at 2. Several weeks after this invocation, Petitioner acknowledged on the record that he knew his counsel had just received new evidence but insisted that he still did not want to waive his right to a speedy trial. Court

Minutes, August 12, 2010. Accordingly, the fact that there was likely no time for a DNA test was of his own choosing and cannot be attributed to counsel. Given the factors counsel was working with, this Court will not second-guess counsel's strategy not to pursue further DNA investigations. Donovan, 94 Nev. at 675, 584 P.2d at 711.

b. Defendant cannot establish actual innocence.

As an initial matter, actual innocence is not a freestanding claim. It is a method by which the mandatory time-bars may be excused if the "new evidence" at issue is both material and exculpatory. The United States Supreme Court has held for over a quarter-century that actual innocence is not "itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993). More recently, the Court has noted that it has not "resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." McQuiggin v. Perkins, 569 U.S. 383, 392, 133 S.Ct. 1924, 1931 (2013). The Nevada Supreme Court, too, "has yet to address whether and, if so, when a free-standing actual innocence claim exists." Berry v. State, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1154 (2015)

Regardless, in order for a defendant to obtain a reversal of his conviction based on a claim of actual innocence, both the United States and Nevada Supreme Courts place the burden on the defendant to show "'it is more likely than not that *no* reasonable juror would have convicted him in light of the new evidence' presented in habeas proceedings." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 315, 115 S. Ct. 851, 861, 130 L. Ed. 2d 808 (1995)); see also Pellegrini, 117 Nev. at 887, 34 P.3d 5at 537. It is true that "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." Schlup, 513 U.S. at 330, 115 S. Ct. at 868. However, this requires "a stronger showing than that needed to establish prejudice." Id. at 327, 115 S. Ct. at 867.

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Newly presented evidence must be "reliable," whether "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." House v. Bell, 547 U.S. 518, 537 (2006) (quoting Schlup, 513 U.S. at 324, 115 S.Ct. at 865.) The U.S. Supreme Court has narrowly interpreted reliability of scientific evidence, specifically noting that "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 62, 129 S. Ct. 2308, 2316 (2009) (citing Bell, 547 U.S. at 540–548, 126 S. Ct. at 2064).

Petitioner alleges the CODIS hit suggesting that another man's DNA was found in the victim's rape kit is new evidence of his actual innocence. Second Petition at 16. However, Petitioner cannot prove that no reasonable juror would have convicted him in light of this information for two reasons. First, it is not reliable, "exculpatory scientific evidence." Schlup, 513 U.S. at 324, 330, 115 S. Ct. at 865, 868. The "CODIS Hit Notification Report" specifically notes that a buccal swab from the individual potentially identified as a match must be obtained "in order to *confirm* this hit." Petitioner's Exhibit 3 at 2 (emphasis added). That is, this is not a conclusive match: "further action" is required. Id. at 5. Petitioner has not argued that he has obtained this further testing. Accordingly, the CODIS hit itself is not reliable exculpatory evidence.

Second, even assuming it is true that another man's sperm was found on the victim, that alone cannot prove Petitioner innocent. Osborne, 557 U.S. at 62, 129 S. Ct. at 2316. There was overwhelming incriminating evidence and an explanation for the presence of any other DNA. Id. This was not an identity case. T.H. was sexually assaulted by a person she had known for at least a year, as Petitioner was dating the victim's mother. Order of Affirmance, October 31, 2012, at 1.; JTT Day 2, at 4, 8–11. Petitioner assaulted T.H. in her own home and drove her to school afterward. Accordingly, identity was not—and would not need to be—established through DNA. As the Nevada Supreme Court found, "T.H.'s testimony was consistent and [] the State presented sufficient evidence from which a rational tier of fact could have found guilt beyond a reasonable doubt." Order of Affirmance, October 31, 2012, at 1.

Further, any other sexual activity of the victim that could have explained the presence of another man's sperm would have been barred via rape shield, as was in fact the case; the Nevada Supreme Court found that evidence of T.H.'s sexual history was properly excluded. Id. at 7–8. Finally, Petitioner was alleged to have sexually assaulted another quasi-step-daughter. That victim actually testified in this case. Her testimony was admissible under NRS 48.045(2) because as the Nevada Supreme Court held, it showed that Petitioner had a motive and opportunity, as well as a common plan, to perpetrate sexual crimes against the teenage daughters of women he dated. Id. at 3.

Petitioner has not shown actual innocence and therefore cannot overcome the threshold of the procedural bars.

c. There was no Brady violation.

Due process obliges a prosecutor to reveal evidence favorable to the defense before trial when that evidence is material to guilt, punishment, or impeachment. Brady v. Maryland, 373 U.S. 83 (1963); Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). There are three components to a successful Brady claim: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, *i.e.*, the evidence was material." Mazzan, 116 Nev. at 67, 993 P.2d at 37.

Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992); see also United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980). Brady "does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); accord United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). Nevada follows the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

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In the post-conviction context of determining whether a Brady claim can overcome the procedural bars, the Nevada Supreme Court has held that "proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." State v. Bennett, 119 Nev. 589, 81 P.3d 1, 8 (2003).

However, the United States Supreme Court has held that a convicted defendant's "right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. The Court held that "Brady is the wrong framework" when examining a due process right to evidence post-conviction. Id. In other words, Brady's due process right to material evidence is incident to a defendant's trial. Once the trial is over and a defendant has been fairly convicted, that right expires. Id. Thus, the Court held that "[i]nstead, the question is whether consideration of [a convicted defendant's] claim within the framework of the State's procedures for postconviction relief offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation." Id. (internal quotations omitted).

Here, Petitioner claimed the State violated Brady by "h[olding] onto the rape kit" and "doing nothing with it for [seven] years." Second Petition at 16–17. However, as the United States Supreme Court explained a decade ago, "Brady is the wrong framework" in examining any information generated after a defendant has already been convicted. Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. Accordingly, Petitioner had no rights under Brady to the "new evidence" at issue here—the DNA report generated years after Petitioner's conviction.

Regardless, Petitioner has not established a Brady violation. First, as discussed *supra*, the CODIS hit is not favorable to Petitioner because there was sufficient independent evidence that Petitioner sexually assaulted T.H. Mazzan, 116 Nev. at 67, 993 P.2d at 37. Whether there were other sources of male DNA found on her person is irrelevant, given her firm identification of Petitioner and her consistent account of the assault. See Order of Affirmance, October 31, 2012, at 1. Second, the CODIS hit was not withheld. As Petitioner admits, when the State

received the CODIS hit, it turned this information over to the Attorney General's Office, which then turned it over to Petitioner. Second Petition at 17–18. Moreover, the existence of the rape kit itself was disclosed well before trial—and trial counsel even cross-examined witnesses about it. JTT Day 1 at 267–68, 276; JTT Day 2 at 150, 154–57. Had the defense wished to test the swabs collected in the rape kit, it could have done its due diligence and obtained its own testing. See Steese, 114 Nev. at 495, 960 P.2d at 331.

Third and finally, there was no prejudice—that is, the evidence was not "material." Mazzan, 116 Nev. at 67, 993 P.2d at 37. As discussed *supra*, defense counsel elicited testimony at trial that Petitioner's DNA had not been found on the victim. JTT Day 2 at 276–77. He would not have been permitted to elicit evidence of the victim's other sexual activity pursuant to Nevada's rape shield statute, as the Nevada Supreme Court noted when it denied Petitioner's direct appeal. See Order of Affirmance at 7–8. The fact that the CODIS hit was from a sperm fragment is also significant in explaining why this evidence would never have been material. T.H. consistently recounted the sexual assaults, stating that Petitioner first sexually assaulted her with his fingers, while wearing rubber gloves, and that he then used his penis to rub her vulva; either way, he did not ejaculate. See Declaration of Arrest at 1–2; JTT, Day 2, at 4, 21–26. According to T.H., herself, any sperm found on the victim would not have been Petitioner's. That is, had this evidence been presented at trial, it would have supported T.H.'s testimony rather than challenge its credibility.

Petitioner had no Brady right to the CODIS hit, given that he was convicted in 2010 and the CODIS hit was generated in 2018. Second Petition at 13. Regardless, Petitioner has not established a Brady violation because this "new evidence" was neither favorable to the accused, nor withheld, nor material. This claim is insufficient to overcome the procedural bars.

d. There was no prosecutorial misconduct.

The Nevada Supreme Court employs a two-step analysis when considering claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, the Court determines if the conduct was improper. Id. Second, the Court determines whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct

unless "the remarks ... were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). With respect to the second step, the Nevada Supreme Court will not reverse if the misconduct was harmless error, which depends on whether it was of constitutional dimension. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Error of a constitutional dimension requires impermissible comment on the exercise of a specific constitutional right, or if in light of the proceedings as a whole, the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d at 477. If the error is not of a constitutional dimension, the Court will reverse only if the error substantially affected the jury's verdict. Id. In determining prejudice, a court considers whether a comment had: 1) a prejudicial impact on the verdict when considered in the context of the trial as a whole; or 2) seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208–09, 163 P.3d at 418.

Here, Petitioner alleged "ongoing prosecutorial misconduct" in that the State did not test T.H.'s rape kit for seven years, did not receive the CODIS hit for another year, and has not tested two of the swabs from the rape kit. Second Petition at 17–18. However, Petitioner has cited absolutely no authority supporting his assertions.

First, the State's actions with regard to the rape kit were not improper. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The State is under no duty to continue to test rape kits after conviction. Even when it did receive the CODIS hit, there was no specific obligation. The duty to provide exculpatory evidence does not extend to information generated after conviction. Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. Further, the law "does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese, 114 Nev. at 495, 960 P.2d at 331 (1998). Indeed, as discussed *supra*, the defense could have had the rape kit independently tested, as it was aware of its existence.

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Second, there has been no conduct warranting reversal. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Even assuming there was a duty to turn over a CODIS hit generated years after a sexual assault conviction, Petitioner admits that the District Attorney's Office provided the information to the Attorney General's Office, which then passed the information along to Petitioner. Second Petition at 17–18. The State in no way concealed this information. And Petitioner has failed to establish there was any undue delay in the handling of this information, let alone provided any precedent supporting an argument for undue delay. Moreover, as discussed above, Petitioner cannot demonstrate actual innocence necessary to overcome the procedural bars even now that he possesses this information. Accordingly, the length of time it took the information to reach Petitioner is irrelevant.

Not only could Petitioner have had T.H.'s rape kit tested at any time, the State had no duty to test evidence in a case where there the jury had already found Petitioner guilty and where his conviction had already been affirmed by the Nevada Supreme Court. And yet, the State did in fact reveal the existence of the CODIS hit as soon as it received that information, which was then disclosed to Petitioner. Petitioner's claim of "prosecutorial misconduct" fails.

e. There was no Confrontation Clause issue.

Petitioner claimed a Confrontation Clause in that he was not allowed to confront T.H. with the information from the CODIS hit. Second Petition at 18. However, this claim—as well as the Brady and prosecutorial misconduct claims—should be considered waived.

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in postconviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001).

Because Petitioner's Confrontation Clause claim does not challenge the validity of a guilty plea nor allege ineffective assistance of counsel, the claim should have been pursued on a direct appeal. NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059. As discussed *supra*, Petitioner could have had the victim's rape kit independently tested at an appropriate time. Had he wished to confront the victim with the resulting information, he could have attempted to do so at trial; or, at least, he could have challenged the trial court's suppression of the evidence on direct appeal. Accordingly, Petitioner cannot demonstrate good cause or prejudice for not bringing this claim at an appropriate time and raising it for the first time only in these habeas proceedings. It is thus waived and summarily dismissed. Id.

Nonetheless, it was in a similar context that the Nevada Supreme Court held that the victim's prior sexual activity was properly excluded at trial. Order of Affirmance, filed October 31, 2012, at 7. Indeed, the Court held that Petitioner's rights under the Confrontation Clause were not violated when he was not permitted to examine T.H. about her sexual history. Id. For similar reasons, Petitioner would not have been permitted to confront T.H. with evidence from the CODIS hit. Thus, this claim is without merit and does not constitute either good cause or prejudice for overcoming the mandatory procedural bars.

Therefore, as Petitioner has failed to demonstrate good cause to overcome the procedural bars, his Petition is time-barred and successive and shall be denied.

ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief shall be, and it is, denied.

DATED this 21 day of February, 2020.

DISTRICT JUDGE
RONALD J. ISRAEL
A-19-797321-W

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

BY
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

hjc/SVU

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2/26/2020 11:17 AM
Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

TYRONE JAMES, Sr,

Petitioner,

vs.

BRIAN WILLIAMS; ET AL.,

Respondent,

Case No: A-19-797521-W

Dept No: XXVIII

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on Februay 25, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on February 26, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Maricela Grant
Maricela Grant, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 26 day of February 2020, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Tyrone James # 1063523
P.O. Box 650
Indian Springs, NV 89070

/s/ Maricela Grant
Maricela Grant, Deputy Clerk

ORIGINAL

FFCO
STEVEN B. WOLFSON
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200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TYRONE JAMES,
#1303556

Defendant.

CASE NO: **A-19-797521-W**
10C265506

DEPT NO: **XXVIII**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: **JANUARY 13, 2020**
TIME OF HEARING: **9:00 AM**

This cause having presented before the Honorable RONALD J. ISRAEL, District Judge, on January 13, 2020; Petitioner being represented by COURTNEY KIRSCHNER, ESQ.; Respondent being represented by STEVEN B. WOLFSON, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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☐ Voluntary Dismissal	■ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ Judgment of Arbitration

STATEMENT OF THE CASE

On June 23, 2010, Tyrone D. James (hereinafter "Petitioner") was charged by way of Information with two counts of Sexual Assault With a Minor Under Sixteen Years of Age (Category A Felony - NRS 200.364, 200.366); two counts of Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210); and one count of Battery with Intent to Commit a Crime (Category A Felony – NRS 200.400).

On August 16, 2010, the State filed a Motion to Admit Evidence of Other Crimes, Wrongs or Acts. On August 25, 2010, Petitioner filed his Opposition. On September 8, 2010, Petitioner filed a Motion in Limine to Preclude Lay Opinion Testimony that the Complaining Witness' Behavior is Consistent with that of a Victim of Sexual Abuse. On September 10, 2010, the State filed its Opposition in open court. This Court conducted a Petrocelli hearing regarding the State's bad acts motion. Ultimately, the Court granted both the State's bad acts motion and Petitioner's motion in limine. On September 17, 2010, Petitioner filed a Motion to Reconsider Motion to Admit Evidence of Other Crimes, Wrongs or Acts. This Court denied Petitioner's Motion on September 21, 2010.

Petitioner's jury trial commenced on September 21, 2010. On September 23, 2010, the jury found Petitioner guilty on all counts.

On January 19, 2011, Petitioner was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – to a maximum term of life with a minimum parole eligibility after 25 years; as to Count 3 – to a maximum term of life with a minimum parole eligibility after 25 years, concurrent with Count 1; as to Count 5 – to a maximum term of Life with a minimum parole eligibility after 2 years, concurrent with Counts 1 and 3. The Court further ordered a sentence of lifetime supervision to be imposed upon Petitioner's release from any term of probation, parole, or imprisonment. Petitioner received 250 days credit for time served. The Court dismissed Counts 2 and 4, as they were lesser-included offenses of Counts 1 and 3. Judgment of Conviction was filed February 9, 2011.

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On March 7, 2011, Petitioner filed a Notice of Appeal. On October 31, 2012, the Nevada Supreme Court issued an Order of Affirmance. Remittitur issued on November 26, 2012.

On March 14, 2013, Petitioner filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition") and Motion to Appoint Counsel. The State filed its Response on May 7, 2013. On May 20, 2013, Robert Langford Esq., was appointed as post-conviction counsel. On September 4, 2015, Petitioner filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplement to First Petition"). On January 15, 2016, Petitioner filed another Supplement to Supplemental Petition for Writ of Habeas Corpus ("Second Supplement to First Petition"). On April 21, 2016, the State filed its Response to both Supplements. On October 3, 2016, this Court held an evidentiary hearing and heard sworn testimony from Bryan Cox, Esq., and Dr. Joyce Adams. On November 8, 2016, this Court entered its Findings of Fact, Conclusions of Law, and Order, denying the First Petition.

On December 8, 2016, Petitioner filed a Notice of Appeal. The Nevada Court of Appeals affirmed the denial on November 14, 2017. Remittitur issued December 29, 2017.

Petitioner filed another Petition for Writ of Habeas Corpus (Post-Conviction) ("Second Petition") on June 27, 2019. The State filed its Response to the Second Petition on August 6, 2019.

Petitioner filed a Post-Conviction Petition Requesting A Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada (NRS 176.0918) ("Genetic Marker Petition") on July 16, 2019. The State filed its Response on July 23, 2019. This Court heard the Petition on July 29, 2019, but continued it. On August 8, 2019, this Court signed an Order requiring the Las Vegas Metropolitan Police Department and Bode Cellmark Forensics Laboratory to preserve all evidence in this case, and, within ninety (90) days, to prepare an inventory thereof and submit a copy of that inventory to the defense, the State, and this Court. On January 13, 2020, the Court denied Petitioner's Petition for Genetic Testing.

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Petitioner submitted a Motion for Stay of his Second Petition on August 8, 2019, based on the DNA testing. On August 19, 2019, this Court heard the Second Petition, noting the Motion for Stay and setting a briefing schedule. The State filed its Response on September 4, 2019. On September 10, 2019, Petitioner filed a Reply. On September 25, 2019, the Court granted Petitioner's Motion. On November 25, 2019, the Court reset the briefing schedule on the Second Petition and set the matter for argument.

On January 13, 2020, the Court held a hearing and took the matter under advisement. The Court now rules as follows:

ANALYSIS

I. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.

a. Petitioner's claims are untimely

Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
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> (a) That the delay is not the fault of the petitioner; and
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> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

In the instant case, the Judgment of Conviction was filed on February 9, 2011, and Petitioner filed a direct appeal. On October 31, 2012, the Nevada Supreme Court affirmed the Judgment of Conviction and remittitur issued on November 26, 2012. Thus, the one-year time bar began to run from this date. The instant Second Petition was not filed until June 27, 2019. This is over seven and a half years after remittitur issued on Petitioner's direct appeal and in is excess of the one-year time frame. Absent a showing of good cause for this delay and undue prejudice, Petition's claim shall be dismissed because of its tardy filing.

b. Petitioner's claims are successive.

Petitioner's Second Petition is procedurally barred because it is successive. NRS 34.810(2) reads:

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

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(emphasis added). Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, as discussed *supra*, this is Petitioner's Second Petition. Petitioner does not deny that it is successive. Second Petition at 3–6. It raises only new and different grounds that could and should have been raised at an earlier, appropriate time. NRS 34.810(2). Accordingly, this Second Petition is an abuse of the writ, procedurally barred, and shall be denied absent a showing of good cause and prejudice. NRS 34.810(3).

II. PETITIONER HAS NOT DEMONSTRATED GOOD CAUSE TO OVERCOME THE PROCEDURAL BAR.

A showing of good cause and prejudice may overcome procedural bars. "To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default.*" Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court

continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Petitioner claimed he could show good cause in the form of "new evidence" that he alleges supports his actual innocence and Brady claims. Second Petition at 11. However, as discussed *infra*, these claims are meritless. Further, because his substantive claims are meritless, Petitioner cannot demonstrate prejudice and his Second Petition is thereby denied.

a. There was no ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323

(1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices

between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant

part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Here, Petitoner alleged his counsel was ineffective for not testing the DNA from the rape kit of the victim, T.H. Second Petition at 15. As an initial matter, any claim that trial counsel should have had the DNA tested has been available for years and so is itself time barred; accordingly, it cannot provide good cause to overcome the procedural bars. Riker, 121 Nev. at 235, 112 P.3d at 1077. Regardless, the claims of ineffectiveness are without merit.

Petitioner argued trial counsel did not know there had been DNA collected from the victim's rape kit. Second Petition at 10. However, this is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. In fact, Detective Daniel Tomaino testified at trial that a rape kit had been collected. Transcript, Jury Trial ("JTT") Day 1, at 252–53. Defense counsel actually cross-examined Det. Tomaino regarding the rape kit. Id. at 267–68, 276. Dr. Theresa Vergara also testified as to the details of the sexual assault examination, including the swabs of the victim's genitalia collected as part of the rape kit. JTT, Day 2 at 150, 154–58. Indeed, as the First Petition made clear, previous counsel—including trial counsel and post-conviction counsel—actually knew Petitioner's DNA was *not* found on the victim. See Supplement to First Petition, September 4, 2015, at 5–6; JTT, Day 1 at 276–77.

It was not an objectively unreasonable strategy to refrain from having the DNA tested. First, given that Petitioner consistently maintained his innocence, had a test revealed that Petitone was lying, his defense would have been severely undermined. This strategic call cannot be evaluated through the benefit of hindsight, knowing that there is now a potential CODIS hit regarding T.H.'s rape kit. Counsel could not have known there was no match to Petitioner unless and until such a test were completed, and the potential risk of having such a test was high. Moreover, Petitioner invoked his right to a speedy trial. Recorder's Transcript of Hearing RE: Arraignment, June 24, 2010, at 2. Several weeks after this invocation, Petitioner acknowledged on the record that he knew his counsel had just received new evidence but insisted that he still did not want to waive his right to a speedy trial. Court

Minutes, August 12, 2010. Accordingly, the fact that there was likely no time for a DNA test was of his own choosing and cannot be attributed to counsel. Given the factors counsel was working with, this Court will not second-guess counsel's strategy not to pursue further DNA investigations. Donovan, 94 Nev. at 675, 584 P.2d at 711.

b. Defendant cannot establish actual innocence.

As an initial matter, actual innocence is not a freestanding claim. It is a method by which the mandatory time-bars may be excused if the "new evidence" at issue is both material and exculpatory. The United States Supreme Court has held for over a quarter-century that actual innocence is not "itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993). More recently, the Court has noted that it has not "resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." McQuiggin v. Perkins, 569 U.S. 383, 392, 133 S.Ct. 1924, 1931 (2013). The Nevada Supreme Court, too, "has yet to address whether and, if so, when a free-standing actual innocence claim exists." Berry v. State, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1154 (2015)

Regardless, in order for a defendant to obtain a reversal of his conviction based on a claim of actual innocence, both the United States and Nevada Supreme Courts place the burden on the defendant to show "'it is more likely than not that *no* reasonable juror would have convicted him in light of the new evidence' presented in habeas proceedings." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 315, 115 S. Ct. 851, 861, 130 L. Ed. 2d 808 (1995)); see also Pellegrini, 117 Nev. at 887, 34 P.3d 5at 537. It is true that "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." Schlup, 513 U.S. at 330, 115 S. Ct. at 868. However, this requires "a stronger showing than that needed to establish prejudice." Id. at 327, 115 S. Ct. at 867.

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Newly presented evidence must be "reliable," whether "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." House v. Bell, 547 U.S. 518, 537 (2006) (quoting Schlup, 513 U.S. at 324, 115 S.Ct. at 865.) The U.S. Supreme Court has narrowly interpreted reliability of scientific evidence, specifically noting that "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 62, 129 S. Ct. 2308, 2316 (2009) (citing Bell, 547 U.S. at 540–548, 126 S. Ct. at 2064).

Petitioner alleges the CODIS hit suggesting that another man's DNA was found in the victim's rape kit is new evidence of his actual innocence. Second Petition at 16. However, Petitioner cannot prove that no reasonable juror would have convicted him in light of this information for two reasons. First, it is not reliable, "exculpatory scientific evidence." Schlup, 513 U.S. at 324, 330, 115 S. Ct. at 865, 868. The "CODIS Hit Notification Report" specifically notes that a buccal swab from the individual potentially identified as a match must be obtained "in order to *confirm* this hit." Petitioner's Exhibit 3 at 2 (emphasis added). That is, this is not a conclusive match: "further action" is required. Id. at 5. Petitioner has not argued that he has obtained this further testing. Accordingly, the CODIS hit itself is not reliable exculpatory evidence.

Second, even assuming it is true that another man's sperm was found on the victim, that alone cannot prove Petitioner innocent. Osborne, 557 U.S. at 62, 129 S. Ct. at 2316. There was overwhelming incriminating evidence and an explanation for the presence of any other DNA. Id. This was not an identity case. T.H. was sexually assaulted by a person she had known for at least a year, as Petitioner was dating the victim's mother. Order of Affirmance, October 31, 2012, at 1.; JTT Day 2, at 4, 8–11. Petitioner assaulted T.H. in her own home and drove her to school afterward. Accordingly, identity was not—and would not need to be—established through DNA. As the Nevada Supreme Court found, "T.H.'s testimony was consistent and [] the State presented sufficient evidence from which a rational tier of fact could have found guilt beyond a reasonable doubt." Order of Affirmance, October 31, 2012, at 1.

Further, any other sexual activity of the victim that could have explained the presence of another man's sperm would have been barred via rape shield, as was in fact the case; the Nevada Supreme Court found that evidence of T.H.'s sexual history was properly excluded. Id. at 7–8. Finally, Petitioner was alleged to have sexually assaulted another quasi-step-daughter. That victim actually testified in this case. Her testimony was admissible under NRS 48.045(2) because as the Nevada Supreme Court held, it showed that Petitioner had a motive and opportunity, as well as a common plan, to perpetrate sexual crimes against the teenage daughters of women he dated. Id. at 3.

Petitioner has not shown actual innocence and therefore cannot overcome the threshold of the procedural bars.

c. There was no Brady violation.

Due process obliges a prosecutor to reveal evidence favorable to the defense before trial when that evidence is material to guilt, punishment, or impeachment. Brady v. Maryland, 373 U.S. 83 (1963); Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). There are three components to a successful Brady claim: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, *i.e.*, the evidence was material." Mazzan, 116 Nev. at 67, 993 P.2d at 37.

Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992); see also United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980). Brady "does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); accord United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). Nevada follows the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

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In the post-conviction context of determining whether a Brady claim can overcome the procedural bars, the Nevada Supreme Court has held that "proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." State v. Bennett, 119 Nev. 589, 81 P.3d 1, 8 (2003).

However, the United States Supreme Court has held that a convicted defendant's "right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. The Court held that "Brady is the wrong framework" when examining a due process right to evidence post-conviction. Id. In other words, Brady's due process right to material evidence is incident to a defendant's trial. Once the trial is over and a defendant has been fairly convicted, that right expires. Id. Thus, the Court held that "[i]nstead, the question is whether consideration of [a convicted defendant's] claim within the framework of the State's procedures for postconviction relief offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation." Id. (internal quotations omitted).

Here, Petitioner claimed the State violated Brady by "h[olding] onto the rape kit" and "doing nothing with it for [seven] years." Second Petition at 16–17. However, as the United States Supreme Court explained a decade ago, "Brady is the wrong framework" in examining any information generated after a defendant has already been convicted. Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. Accordingly, Petitioner had no rights under Brady to the "new evidence" at issue here—the DNA report generated years after Petitioner's conviction.

Regardless, Petitioner has not established a Brady violation. First, as discussed *supra*, the CODIS hit is not favorable to Petitioner because there was sufficient independent evidence that Petitioner sexually assaulted T.H. Mazzan, 116 Nev. at 67, 993 P.2d at 37. Whether there were other sources of male DNA found on her person is irrelevant, given her firm identification of Petitioner and her consistent account of the assault. See Order of Affirmance, October 31, 2012, at 1. Second, the CODIS hit was not withheld. As Petitioner admits, when the State

received the CODIS hit, it turned this information over to the Attorney General's Office, which then turned it over to Petitioner. Second Petition at 17–18. Moreover, the existence of the rape kit itself was disclosed well before trial—and trial counsel even cross-examined witnesses about it. JTT Day 1 at 267–68, 276; JTT Day 2 at 150, 154–57. Had the defense wished to test the swabs collected in the rape kit, it could have done its due diligence and obtained its own testing. See Steese, 114 Nev. at 495, 960 P.2d at 331.

Third and finally, there was no prejudice—that is, the evidence was not "material." Mazzan, 116 Nev. at 67, 993 P.2d at 37. As discussed *supra*, defense counsel elicited testimony at trial that Petitioner's DNA had not been found on the victim. JTT Day 2 at 276–77. He would not have been permitted to elicit evidence of the victim's other sexual activity pursuant to Nevada's rape shield statute, as the Nevada Supreme Court noted when it denied Petitioner's direct appeal. See Order of Affirmance at 7–8. The fact that the CODIS hit was from a sperm fragment is also significant in explaining why this evidence would never have been material. T.H. consistently recounted the sexual assaults, stating that Petitioner first sexually assaulted her with his fingers, while wearing rubber gloves, and that he then used his penis to rub her vulva; either way, he did not ejaculate. See Declaration of Arrest at 1–2; JTT, Day 2, at 4, 21–26. According to T.H., herself, any sperm found on the victim would not have been Petitioner's. That is, had this evidence been presented at trial, it would have supported T.H.'s testimony rather than challenge its credibility.

Petitioner had no Brady right to the CODIS hit, given that he was convicted in 2010 and the CODIS hit was generated in 2018. Second Petition at 13. Regardless, Petitioner has not established a Brady violation because this "new evidence" was neither favorable to the accused, nor withheld, nor material. This claim is insufficient to overcome the procedural bars.

d. There was no prosecutorial misconduct.

The Nevada Supreme Court employs a two-step analysis when considering claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, the Court determines if the conduct was improper. Id. Second, the Court determines whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct

unless "the remarks ... were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). With respect to the second step, the Nevada Supreme Court will not reverse if the misconduct was harmless error, which depends on whether it was of constitutional dimension. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Error of a constitutional dimension requires impermissible comment on the exercise of a specific constitutional right, or if in light of the proceedings as a whole, the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d at 477. If the error is not of a constitutional dimension, the Court will reverse only if the error substantially affected the jury's verdict. Id. In determining prejudice, a court considers whether a comment had: 1) a prejudicial impact on the verdict when considered in the context of the trial as a whole; or 2) seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208–09, 163 P.3d at 418.

Here, Petitioner alleged "ongoing prosecutorial misconduct" in that the State did not test T.H.'s rape kit for seven years, did not receive the CODIS hit for another year, and has not tested two of the swabs from the rape kit. Second Petition at 17–18. However, Petitioner has cited absolutely no authority supporting his assertions.

First, the State's actions with regard to the rape kit were not improper. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The State is under no duty to continue to test rape kits after conviction. Even when it did receive the CODIS hit, there was no specific obligation. The duty to provide exculpatory evidence does not extend to information generated after conviction. Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. Further, the law "does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese, 114 Nev. at 495, 960 P.2d at 331 (1998). Indeed, as discussed *supra*, the defense could have had the rape kit independently tested, as it was aware of its existence.

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Second, there has been no conduct warranting reversal. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Even assuming there was a duty to turn over a CODIS hit generated years after a sexual assault conviction, Petitioner admits that the District Attorney's Office provided the information to the Attorney General's Office, which then passed the information along to Petitioner. Second Petition at 17–18. The State in no way concealed this information. And Petitioner has failed to establish there was any undue delay in the handling of this information, let alone provided any precedent supporting an argument for undue delay. Moreover, as discussed above, Petitioner cannot demonstrate actual innocence necessary to overcome the procedural bars even now that he possesses this information. Accordingly, the length of time it took the information to reach Petitioner is irrelevant.

Not only could Petitioner have had T.H.'s rape kit tested at any time, the State had no duty to test evidence in a case where there the jury had already found Petitioner guilty and where his conviction had already been affirmed by the Nevada Supreme Court. And yet, the State did in fact reveal the existence of the CODIS hit as soon as it received that information, which was then disclosed to Petitioner. Petitioner's claim of "prosecutorial misconduct" fails.

e. There was no Confrontation Clause issue.

Petitioner claimed a Confrontation Clause in that he was not allowed to confront T.H. with the information from the CODIS hit. Second Petition at 18. However, this claim—as well as the Brady and prosecutorial misconduct claims—should be considered waived.

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
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> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
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> . . .
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in postconviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001).

Because Petitioner's Confrontation Clause claim does not challenge the validity of a guilty plea nor allege ineffective assistance of counsel, the claim should have been pursued on a direct appeal. NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059. As discussed *supra*, Petitioner could have had the victim's rape kit independently tested at an appropriate time. Had he wished to confront the victim with the resulting information, he could have attempted to do so at trial; or, at least, he could have challenged the trial court's suppression of the evidence on direct appeal. Accordingly, Petitioner cannot demonstrate good cause or prejudice for not bringing this claim at an appropriate time and raising it for the first time only in these habeas proceedings. It is thus waived and summarily dismissed. Id.

Nonetheless, it was in a similar context that the Nevada Supreme Court held that the victim's prior sexual activity was properly excluded at trial. Order of Affirmance, filed October 31, 2012, at 7. Indeed, the Court held that Petitioner's rights under the Confrontation Clause were not violated when he was not permitted to examine T.H. about her sexual history. Id. For similar reasons, Petitioner would not have been permitted to confront T.H. with evidence from the CODIS hit. Thus, this claim is without merit and does not constitute either good cause or prejudice for overcoming the mandatory procedural bars.

Therefore, as Petitioner has failed to demonstrate good cause to overcome the procedural bars, his Petition is time-barred and successive and shall be denied.

ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief shall be, and it is, denied.

DATED this 21 day of February, 2020.

DISTRICT JUDGE
RONALD J. ISRAEL
A-19-797321-W

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

BY
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

hjc/SVU

NEO

Electronically Filed
02/26/2020
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

TYRONE JAMES,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 10C265506

Dept No: XXVIII

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on Februay 25, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on February 26, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Maricela Grant

Maricela Grant, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 26 day of February 2020, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Tyrone James # 1063523
P.O. Box 650
Indian Springs, NV 89070

Rene Valladares
411 E. Bonneville Ave., Ste 250
Las Vegas, NV 89101

/s/ Maricela Grant

Maricela Grant, Deputy Clerk

ORIGINAL

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TYRONE JAMES,
#1303556

Defendant.

CASE NO: **A-19-797521-W**
10C265506

DEPT NO: **XXVIII**

FINDINGS OF FACT, CONCLUSIONS

OF LAW AND ORDER

DATE OF HEARING: **JANUARY 13, 2020**
TIME OF HEARING: **9:00 AM**

This cause having presented before the Honorable RONALD J. ISRAEL, District Judge, on January 13, 2020; Petitioner being represented by COURTNEY KIRSCHNER, ESQ.; Respondent being represented by STEVEN B. WOLFSON, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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☐ Voluntary Dismissal
☐ Involuntary Dismissal
☐ Stipulated Dismissal
☐ Motion to Dismiss by Deft(s)
☒ Summary Judgment
☐ Stipulated Judgment
☐ Default Judgment
☐ Judgment of Arbitration

2/25/2020

STATEMENT OF THE CASE

On June 23, 2010, Tyrone D. James (hereinafter "Petitioner") was charged by way of Information with two counts of Sexual Assault With a Minor Under Sixteen Years of Age (Category A Felony - NRS 200.364, 200.366); two counts of Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210); and one count of Battery with Intent to Commit a Crime (Category A Felony – NRS 200.400).

On August 16, 2010, the State filed a Motion to Admit Evidence of Other Crimes, Wrongs or Acts. On August 25, 2010, Petitioner filed his Opposition. On September 8, 2010, Petitioner filed a Motion in Limine to Preclude Lay Opinion Testimony that the Complaining Witness' Behavior is Consistent with that of a Victim of Sexual Abuse. On September 10, 2010, the State filed its Opposition in open court. This Court conducted a Petrocelli hearing regarding the State's bad acts motion. Ultimately, the Court granted both the State's bad acts motion and Petitioner's motion in limine. On September 17, 2010, Petitioner filed a Motion to Reconsider Motion to Admit Evidence of Other Crimes, Wrongs or Acts. This Court denied Petitioner's Motion on September 21, 2010.

Petitioner's jury trial commenced on September 21, 2010. On September 23, 2010, the jury found Petitioner guilty on all counts.

On January 19, 2011, Petitioner was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – to a maximum term of life with a minimum parole eligibility after 25 years; as to Count 3 – to a maximum term of life with a minimum parole eligibility after 25 years, concurrent with Count 1; as to Count 5 – to a maximum term of Life with a minimum parole eligibility after 2 years, concurrent with Counts 1 and 3. The Court further ordered a sentence of lifetime supervision to be imposed upon Petitioner's release from any term of probation, parole, or imprisonment. Petitioner received 250 days credit for time served. The Court dismissed Counts 2 and 4, as they were lesser-included offenses of Counts 1 and 3. Judgment of Conviction was filed February 9, 2011.

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On March 7, 2011, Petitioner filed a Notice of Appeal. On October 31, 2012, the Nevada Supreme Court issued an Order of Affirmance. Remittitur issued on November 26, 2012.

On March 14, 2013, Petitioner filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition") and Motion to Appoint Counsel. The State filed its Response on May 7, 2013. On May 20, 2013, Robert Langford Esq., was appointed as post-conviction counsel. On September 4, 2015, Petitioner filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplement to First Petition"). On January 15, 2016, Petitioner filed another Supplement to Supplemental Petition for Writ of Habeas Corpus ("Second Supplement to First Petition"). On April 21, 2016, the State filed its Response to both Supplements. On October 3, 2016, this Court held an evidentiary hearing and heard sworn testimony from Bryan Cox, Esq., and Dr. Joyce Adams. On November 8, 2016, this Court entered its Findings of Fact, Conclusions of Law, and Order, denying the First Petition.

On December 8, 2016, Petitioner filed a Notice of Appeal. The Nevada Court of Appeals affirmed the denial on November 14, 2017. Remittitur issued December 29, 2017.

Petitioner filed another Petition for Writ of Habeas Corpus (Post-Conviction) ("Second Petition") on June 27, 2019. The State filed its Response to the Second Petition on August 6, 2019.

Petitioner filed a Post-Conviction Petition Requesting A Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada (NRS 176.0918) ("Genetic Marker Petition") on July 16, 2019. The State filed its Response on July 23, 2019. This Court heard the Petition on July 29, 2019, but continued it. On August 8, 2019, this Court signed an Order requiring the Las Vegas Metropolitan Police Department and Bode Cellmark Forensics Laboratory to preserve all evidence in this case, and, within ninety (90) days, to prepare an inventory thereof and submit a copy of that inventory to the defense, the State, and this Court. On January 13, 2020, the Court denied Petitioner's Petition for Genetic Testing.

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Petitioner submitted a Motion for Stay of his Second Petition on August 8, 2019, based on the DNA testing. On August 19, 2019, this Court heard the Second Petition, noting the Motion for Stay and setting a briefing schedule. The State filed its Response on September 4, 2019. On September 10, 2019, Petitioner filed a Reply. On September 25, 2019, the Court granted Petitioner's Motion. On November 25, 2019, the Court reset the briefing schedule on the Second Petition and set the matter for argument.

On January 13, 2020, the Court held a hearing and took the matter under advisement. The Court now rules as follows:

ANALYSIS

I. PETITIONER'S CLAIMS ARE PROCEDURALLY BARRED.

a. Petitioner's claims are untimely

Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
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> (a) That the delay is not the fault of the petitioner; and
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> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

In the instant case, the Judgment of Conviction was filed on February 9, 2011, and Petitioner filed a direct appeal. On October 31, 2012, the Nevada Supreme Court affirmed the Judgment of Conviction and remittitur issued on November 26, 2012. Thus, the one-year time bar began to run from this date. The instant Second Petition was not filed until June 27, 2019. This is over seven and a half years after remittitur issued on Petitioner's direct appeal and in is excess of the one-year time frame. Absent a showing of good cause for this delay and undue prejudice, Petition's claim shall be dismissed because of its tardy filing.

b. Petitioner's claims are successive.

Petitioner's Second Petition is procedurally barred because it is successive. NRS 34.810(2) reads:

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

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(emphasis added). Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, as discussed *supra*, this is Petitioner's Second Petition. Petitioner does not deny that it is successive. Second Petition at 3–6. It raises only new and different grounds that could and should have been raised at an earlier, appropriate time. NRS 34.810(2). Accordingly, this Second Petition is an abuse of the writ, procedurally barred, and shall be denied absent a showing of good cause and prejudice. NRS 34.810(3).

II. PETITIONER HAS NOT DEMONSTRATED GOOD CAUSE TO OVERCOME THE PROCEDURAL BAR.

A showing of good cause and prejudice may overcome procedural bars. "To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court

continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Petitioner claimed he could show good cause in the form of "new evidence" that he alleges supports his actual innocence and Brady claims. Second Petition at 11. However, as discussed *infra*, these claims are meritless. Further, because his substantive claims are meritless, Petitioner cannot demonstrate prejudice and his Second Petition is thereby denied.

a. There was no ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323

(1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices

between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant

part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Here, Petitoner alleged his counsel was ineffective for not testing the DNA from the rape kit of the victim, T.H. Second Petition at 15. As an initial matter, any claim that trial counsel should have had the DNA tested has been available for years and so is itself time barred; accordingly, it cannot provide good cause to overcome the procedural bars. Riker, 121 Nev. at 235, 112 P.3d at 1077. Regardless, the claims of ineffectiveness are without merit.

Petitioner argued trial counsel did not know there had been DNA collected from the victim's rape kit. Second Petition at 10. However, this is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. In fact, Detective Daniel Tomaino testified at trial that a rape kit had been collected. Transcript, Jury Trial ("JTT") Day 1, at 252–53. Defense counsel actually cross-examined Det. Tomaino regarding the rape kit. Id. at 267–68, 276. Dr. Theresa Vergara also testified as to the details of the sexual assault examination, including the swabs of the victim's genitalia collected as part of the rape kit. JTT, Day 2 at 150, 154–58. Indeed, as the First Petition made clear, previous counsel—including trial counsel and post-conviction counsel—actually knew Petitioner's DNA was *not* found on the victim. See Supplement to First Petition, September 4, 2015, at 5–6; JTT, Day 1 at 276–77.

It was not an objectively unreasonable strategy to refrain from having the DNA tested. First, given that Petitioner consistently maintained his innocence, had a test revealed that Petitone was lying, his defense would have been severely undermined. This strategic call cannot be evaluated through the benefit of hindsight, knowing that there is now a potential CODIS hit regarding T.H.'s rape kit. Counsel could not have known there was no match to Petitioner unless and until such a test were completed, and the potential risk of having such a test was high. Moreover, Petitioner invoked his right to a speedy trial. Recorder's Transcript of Hearing RE: Arraignment, June 24, 2010, at 2. Several weeks after this invocation, Petitioner acknowledged on the record that he knew his counsel had just received new evidence but insisted that he still did not want to waive his right to a speedy trial. Court

Minutes, August 12, 2010. Accordingly, the fact that there was likely no time for a DNA test was of his own choosing and cannot be attributed to counsel. Given the factors counsel was working with, this Court will not second-guess counsel's strategy not to pursue further DNA investigations. Donovan, 94 Nev. at 675, 584 P.2d at 711.

b. Defendant cannot establish actual innocence.

As an initial matter, actual innocence is not a freestanding claim. It is a method by which the mandatory time-bars may be excused if the "new evidence" at issue is both material and exculpatory. The United States Supreme Court has held for over a quarter-century that actual innocence is not "itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993). More recently, the Court has noted that it has not "resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." McQuiggin v. Perkins, 569 U.S. 383, 392, 133 S.Ct. 1924, 1931 (2013). The Nevada Supreme Court, too, "has yet to address whether and, if so, when a free-standing actual innocence claim exists." Berry v. State, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1154 (2015)

Regardless, in order for a defendant to obtain a reversal of his conviction based on a claim of actual innocence, both the United States and Nevada Supreme Courts place the burden on the defendant to show "'it is more likely than not that *no* reasonable juror would have convicted him in light of the new evidence' presented in habeas proceedings." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 315, 115 S. Ct. 851, 861, 130 L. Ed. 2d 808 (1995)); see also Pellegrini, 117 Nev. at 887, 34 P.3d 5at 537. It is true that "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." Schlup, 513 U.S. at 330, 115 S. Ct. at 868. However, this requires "a stronger showing than that needed to establish prejudice." Id. at 327, 115 S. Ct. at 867.

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Newly presented evidence must be "reliable," whether "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." House v. Bell, 547 U.S. 518, 537 (2006) (quoting Schlup, 513 U.S. at 324, 115 S.Ct. at 865.) The U.S. Supreme Court has narrowly interpreted reliability of scientific evidence, specifically noting that "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 62, 129 S. Ct. 2308, 2316 (2009) (citing Bell, 547 U.S. at 540–548, 126 S. Ct. at 2064).

Petitioner alleges the CODIS hit suggesting that another man's DNA was found in the victim's rape kit is new evidence of his actual innocence. Second Petition at 16. However, Petitioner cannot prove that no reasonable juror would have convicted him in light of this information for two reasons. First, it is not reliable, "exculpatory scientific evidence." Schlup, 513 U.S. at 324, 330, 115 S. Ct. at 865, 868. The "CODIS Hit Notification Report" specifically notes that a buccal swab from the individual potentially identified as a match must be obtained "in order to *confirm* this hit." Petitioner's Exhibit 3 at 2 (emphasis added). That is, this is not a conclusive match: "further action" is required. Id. at 5. Petitioner has not argued that he has obtained this further testing. Accordingly, the CODIS hit itself is not reliable exculpatory evidence.

Second, even assuming it is true that another man's sperm was found on the victim, that alone cannot prove Petitioner innocent. Osborne, 557 U.S. at 62, 129 S. Ct. at 2316. There was overwhelming incriminating evidence and an explanation for the presence of any other DNA. Id. This was not an identity case. T.H. was sexually assaulted by a person she had known for at least a year, as Petitioner was dating the victim's mother. Order of Affirmance, October 31, 2012, at 1.; JTT Day 2, at 4, 8–11. Petitioner assaulted T.H. in her own home and drove her to school afterward. Accordingly, identity was not—and would not need to be—established through DNA. As the Nevada Supreme Court found, "T.H.'s testimony was consistent and [] the State presented sufficient evidence from which a rational tier of fact could have found guilt beyond a reasonable doubt." Order of Affirmance, October 31, 2012, at 1.

Further, any other sexual activity of the victim that could have explained the presence of another man's sperm would have been barred via rape shield, as was in fact the case; the Nevada Supreme Court found that evidence of T.H.'s sexual history was properly excluded. Id. at 7–8. Finally, Petitioner was alleged to have sexually assaulted another quasi-step-daughter. That victim actually testified in this case. Her testimony was admissible under NRS 48.045(2) because as the Nevada Supreme Court held, it showed that Petitioner had a motive and opportunity, as well as a common plan, to perpetrate sexual crimes against the teenage daughters of women he dated. Id. at 3.

Petitioner has not shown actual innocence and therefore cannot overcome the threshold of the procedural bars.

c. There was no Brady violation.

Due process obliges a prosecutor to reveal evidence favorable to the defense before trial when that evidence is material to guilt, punishment, or impeachment. Brady v. Maryland, 373 U.S. 83 (1963); Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). There are three components to a successful Brady claim: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, *i.e.*, the evidence was material." Mazzan, 116 Nev. at 67, 993 P.2d at 37.

Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992); see also United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980). Brady "does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); accord United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). Nevada follows the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

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In the post-conviction context of determining whether a Brady claim can overcome the procedural bars, the Nevada Supreme Court has held that "proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." State v. Bennett, 119 Nev. 589, 81 P.3d 1, 8 (2003).

However, the United States Supreme Court has held that a convicted defendant's "right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. The Court held that "Brady is the wrong framework" when examining a due process right to evidence post-conviction. Id. In other words, Brady's due process right to material evidence is incident to a defendant's trial. Once the trial is over and a defendant has been fairly convicted, that right expires. Id. Thus, the Court held that "[i]nstead, the question is whether consideration of [a convicted defendant's] claim within the framework of the State's procedures for postconviction relief offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation." Id. (internal quotations omitted).

Here, Petitioner claimed the State violated Brady by "h[olding] onto the rape kit" and "doing nothing with it for [seven] years." Second Petition at 16–17. However, as the United States Supreme Court explained a decade ago, "Brady is the wrong framework" in examining any information generated after a defendant has already been convicted. Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. Accordingly, Petitioner had no rights under Brady to the "new evidence" at issue here—the DNA report generated years after Petitioner's conviction.

Regardless, Petitioner has not established a Brady violation. First, as discussed *supra*, the CODIS hit is not favorable to Petitioner because there was sufficient independent evidence that Petitioner sexually assaulted T.H. Mazzan, 116 Nev. at 67, 993 P.2d at 37. Whether there were other sources of male DNA found on her person is irrelevant, given her firm identification of Petitioner and her consistent account of the assault. See Order of Affirmance, October 31, 2012, at 1. Second, the CODIS hit was not withheld. As Petitioner admits, when the State

received the CODIS hit, it turned this information over to the Attorney General's Office, which then turned it over to Petitioner. Second Petition at 17–18. Moreover, the existence of the rape kit itself was disclosed well before trial—and trial counsel even cross-examined witnesses about it. JTT Day 1 at 267–68, 276; JTT Day 2 at 150, 154–57. Had the defense wished to test the swabs collected in the rape kit, it could have done its due diligence and obtained its own testing. See Steese, 114 Nev. at 495, 960 P.2d at 331.

Third and finally, there was no prejudice—that is, the evidence was not "material." Mazzan, 116 Nev. at 67, 993 P.2d at 37. As discussed *supra*, defense counsel elicited testimony at trial that Petitioner's DNA had not been found on the victim. JTT Day 2 at 276–77. He would not have been permitted to elicit evidence of the victim's other sexual activity pursuant to Nevada's rape shield statute, as the Nevada Supreme Court noted when it denied Petitioner's direct appeal. See Order of Affirmance at 7–8. The fact that the CODIS hit was from a sperm fragment is also significant in explaining why this evidence would never have been material. T.H. consistently recounted the sexual assaults, stating that Petitioner first sexually assaulted her with his fingers, while wearing rubber gloves, and that he then used his penis to rub her vulva; either way, he did not ejaculate. See Declaration of Arrest at 1–2; JTT, Day 2, at 4, 21–26. According to T.H., herself, any sperm found on the victim would not have been Petitioner's. That is, had this evidence been presented at trial, it would have supported T.H.'s testimony rather than challenge its credibility.

Petitioner had no Brady right to the CODIS hit, given that he was convicted in 2010 and the CODIS hit was generated in 2018. Second Petition at 13. Regardless, Petitioner has not established a Brady violation because this "new evidence" was neither favorable to the accused, nor withheld, nor material. This claim is insufficient to overcome the procedural bars.

d. There was no prosecutorial misconduct.

The Nevada Supreme Court employs a two-step analysis when considering claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, the Court determines if the conduct was improper. Id. Second, the Court determines whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct

unless "the remarks ... were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). With respect to the second step, the Nevada Supreme Court will not reverse if the misconduct was harmless error, which depends on whether it was of constitutional dimension. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Error of a constitutional dimension requires impermissible comment on the exercise of a specific constitutional right, or if in light of the proceedings as a whole, the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d at 477. If the error is not of a constitutional dimension, the Court will reverse only if the error substantially affected the jury's verdict. Id. In determining prejudice, a court considers whether a comment had: 1) a prejudicial impact on the verdict when considered in the context of the trial as a whole; or 2) seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208–09, 163 P.3d at 418.

Here, Petitioner alleged "ongoing prosecutorial misconduct" in that the State did not test T.H.'s rape kit for seven years, did not receive the CODIS hit for another year, and has not tested two of the swabs from the rape kit. Second Petition at 17–18. However, Petitioner has cited absolutely no authority supporting his assertions.

First, the State's actions with regard to the rape kit were not improper. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The State is under no duty to continue to test rape kits after conviction. Even when it did receive the CODIS hit, there was no specific obligation. The duty to provide exculpatory evidence does not extend to information generated after conviction. Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. Further, the law "does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese, 114 Nev. at 495, 960 P.2d at 331 (1998). Indeed, as discussed *supra*, the defense could have had the rape kit independently tested, as it was aware of its existence.

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Second, there has been no conduct warranting reversal. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Even assuming there was a duty to turn over a CODIS hit generated years after a sexual assault conviction, Petitioner admits that the District Attorney's Office provided the information to the Attorney General's Office, which then passed the information along to Petitioner. Second Petition at 17–18. The State in no way concealed this information. And Petitioner has failed to establish there was any undue delay in the handling of this information, let alone provided any precedent supporting an argument for undue delay. Moreover, as discussed above, Petitioner cannot demonstrate actual innocence necessary to overcome the procedural bars even now that he possesses this information. Accordingly, the length of time it took the information to reach Petitioner is irrelevant.

Not only could Petitioner have had T.H.'s rape kit tested at any time, the State had no duty to test evidence in a case where there the jury had already found Petitioner guilty and where his conviction had already been affirmed by the Nevada Supreme Court. And yet, the State did in fact reveal the existence of the CODIS hit as soon as it received that information, which was then disclosed to Petitioner. Petitioner's claim of "prosecutorial misconduct" fails.

e. There was no Confrontation Clause issue.

Petitioner claimed a Confrontation Clause in that he was not allowed to confront T.H. with the information from the CODIS hit. Second Petition at 18. However, this claim—as well as the Brady and prosecutorial misconduct claims—should be considered waived.

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in postconviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001).

Because Petitioner's Confrontation Clause claim does not challenge the validity of a guilty plea nor allege ineffective assistance of counsel, the claim should have been pursued on a direct appeal. NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059. As discussed *supra*, Petitioner could have had the victim's rape kit independently tested at an appropriate time. Had he wished to confront the victim with the resulting information, he could have attempted to do so at trial; or, at least, he could have challenged the trial court's suppression of the evidence on direct appeal. Accordingly, Petitioner cannot demonstrate good cause or prejudice for not bringing this claim at an appropriate time and raising it for the first time only in these habeas proceedings. It is thus waived and summarily dismissed. Id.

Nonetheless, it was in a similar context that the Nevada Supreme Court held that the victim's prior sexual activity was properly excluded at trial. Order of Affirmance, filed October 31, 2012, at 7. Indeed, the Court held that Petitioner's rights under the Confrontation Clause were not violated when he was not permitted to examine T.H. about her sexual history. Id. For similar reasons, Petitioner would not have been permitted to confront T.H. with evidence from the CODIS hit. Thus, this claim is without merit and does not constitute either good cause or prejudice for overcoming the mandatory procedural bars.

Therefore, as Petitioner has failed to demonstrate good cause to overcome the procedural bars, his Petition is time-barred and successive and shall be denied.

ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief shall be, and it is, denied.

DATED this 21 day of February, 2020.

DISTRICT JUDGE
RONALD J. ISRAEL
A-19-797521-W

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. Brain Williams, et al., Respondents.	Case No. A-19-767521-W Dept. No. XXVIII

NOTICE OF APPEAL

Notice is hereby given that Petitioner Tyrone James appeals to the Nevada Supreme Court from the Findings of Fact, Conclusions of Law and Order entered in this action on February 25, 2020. The Notice of Entry of Order was mailed on February 26, 2020.

Dated this 24th day of March, 2020.

Respectfully submitted,
Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2020, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Chief Deputy District Attorney James.Sweetin@clarkcountyda.com, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

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