NOAS

Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Counsel for Petitioner Tyrone James

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr.,

Petitioner,

v.

Brain Williams, et al.,

Respondents.

A-19-797521-W

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:

Geordan Goebel
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Tyrone James
#1063523
High Desert State Prison
PO Box 650
Indian Springs, NV 89070

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

ASTA
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
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*Counsel for Petitioner Tyrone James

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. Brian Williams, et al., Respondents.	Case No. A-19-797521-W Dept. No. XXVIII

CASE APPEAL STATEMENT

1. Name of petitioner filing this case appeal statement:

Tyrone James

2. Identify the judge issuing the order appealed from:

Hon. Ronald J. Israel, District Court Judge, Dept. XXVIII, Eighth Judicial District, Clark County, Nevada.

3. Identify each appellant and the name and address of counsel for each appellant:

Tyrone James represented by C.B. Kirschner, Assistant Federal Public Defender, Federal Public Defender, District of Nevada, 411 E. Bonneville Ave., Suite 250, Las Vegas, NV 89101.

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent:

Brian Williams represented by James R. Sweetin, Deputy District Attorney, Clark County District Attorney's Office, 200 Lewis Avenue, Las Vegas, Nevada, 89155-2212.

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42:

N/A.

6. Whether petitioner/appellant was represented by appointed or retained counsel in the district court:

James was represented in the district court by counsel previously appointed to represent him in a related federal matter.

7. Whether petitioner/appellant is represented by appointed or retained counsel on appeal:

James is represented on appeal by counsel previously appointed to represent him in a related federal matter.

8. Whether petitioner/appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

James was previously granted permission to proceed *in forma pauperis*.

9. Date proceedings commenced in the district court (e.g., date complaint, indictment, information or petition was filed):

James filed his Petition for Writ of Habeas Corpus (Post-Conviction) on June 27, 2019.

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This is an appeal of the order denying James's post-conviction petition.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court or Court of Appeals and, if so, the caption and docket number of the prior proceeding:

James previously filed appeals to this Court in:

James v. State, Docket 57178;

James v. State, Docket 71935;

James v. State, Docket 71935-COA.

12. Indicate whether this appeal involves child custody or visitation:

This appeal does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

N/A, this is a criminal, post-conviction case.

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:

Geordan Goebel
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Tyrone James
#1063523
High Desert State Prison
PO Box 650
Indian Springs, NV 89070

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

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-19-797521-W

Tyrone James, Sr., Plaintiff(s)	§	Location:	**Department 28**
vs.	§	Judicial Officer:	**Israel, Ronald J.**
Brian Williams, Defendant(s)	§	Filed on:	**06/27/2019**
	§	Case Number History:	
	§	Cross-Reference Case Number:	**A797521**

CASE INFORMATION

Related Cases
10C265506 (Writ Related Case)

Statistical Closures
01/20/2020 Summary Judgment

Case Type: **Writ of Habeas Corpus**

Case Status: **01/20/2020 Closed**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	A-19-797521-W
Court	Department 28
Date Assigned	08/07/2019
Judicial Officer	Israel, Ronald J.

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**James, Tyrone David, Sr.**	**Kirschner, Courtney** *Retained*
Defendant	**State of Nevada, Attorney General**	**Wolfson, Steven B** *Retained* 702-455-5320(W)
	Williams, Brian	**Wolfson, Steven B** *Retained* 702-455-5320(W)

DATE — EVENTS & ORDERS OF THE COURT — INDEX

EVENTS

06/27/2019 Petition for Writ of Habeas Corpus
Filed by: Plaintiff James, Tyrone David, Sr.
Petition for Writ of Habeas Corpus (Post-Conviction)

06/27/2019 Exhibits
Filed By: Plaintiff James, Tyrone David, Sr.
Index of Exhibits in Support of Petition for Writ of Habeas Corpus, Exhibits 1-2

06/27/2019 Motion to Seal/Redact Records
Filed By: Plaintiff James, Tyrone David, Sr.
Motion to File Exhibit Under Seal

06/27/2019 Filed Under Seal
Index Of Exhibits In Support Of Petition For Writ Of Habeas Corpus (Post-Conviction) (Part 2 - Filed Under Seal) (Per 6/27/19 Motion To File Exhibit Under Seal)

06/28/2019 Clerk's Notice of Hearing
Notice of Hearing

08/06/2019 Response
State's Response to Defendant s Post-Conviction Petition for Writ of Habeas Corpus (Post-Conviction) and support of the State s Motion to Dismiss

08/07/2019 Notice of Department Reassignment
Notice of Department Reassignment

09/04/2019 Response
State's Response to Defendant s Motion for Stay of Post-Conviction Petition for Writ of Habeas Corpus (Post-Conviction)

09/10/2019 Reply
Filed by: Plaintiff James, Tyrone David, Sr.
Reply to State's Response to Motion for Stay of Petition for Writ of Habeas Corpus (Post-Conviction)

01/20/2020 Order to Statistically Close Case
Civil Order To Statistically Close Case

02/05/2020 Recorders Transcript of Hearing
Status Check: Status of Stay//Reset Petition for Writ

02/25/2020 Findings of Fact, Conclusions of Law and Order

02/26/2020 Notice of Entry
Filed By: Defendant Williams, Brian
Notice of Entry of Findings of Fact, Conclusions of Law and Order

03/24/2020 Case Appeal Statement
Filed By: Plaintiff James, Tyrone David, Sr.
Case Appeal Statement

03/24/2020 Notice of Appeal
Filed By: Plaintiff James, Tyrone David, Sr.
Notice of Appeal

HEARINGS

06/28/2019 **Minute Order** (3:00 AM) (Judicial Officer: Crockett, Jim)
Minute Order - Assignment to Department 28
Minute Order - No Hearing Held; Minute Order - Assignment to Department 28
Journal Entry Details:

IT HAS COME to the attention of the Court that a Petition for Writ of Habeas Corpus was assigned a civil case number and assigned to Department 24 under Case number A-19-797521-W, TYRONE DAVID JAMES Sr. v. BRIAN WILLIAMS, et. al. Petitioner has filed a new action and entitles the pleading a Petition for Writ of Habeas Corpus (Post- Conviction). It appears the Petition is challenging the constitutionality of the Nevada revised Statutes under which he was prosecuted, which this Court interprets as a challenge to his Judgment of Conviction pursuant to NRS 34.720 to NRS 34.830. As NRS 34.730(b) requires that challenges to the Judgment of Conviction be assigned whenever possible to the original Judge or Court, it appears this matter has been incorrectly assigned to Department 24, rather than assigned to the Department assigned to Petitioner's underlying criminal matter: 10C265506, which was resolved by Department 28. COURT ORDERED, District Court Clerk's office to file all documents erroneously filed in A-19-797521-W in the correct case 10C265506, pursuant to

NRS 34.730(3)(b), COURT FURTHER ORDERS, CASE No. A-19-797521-W CLOSED. CLERK'S NOTE: The above minute order has been distributed to: Rene L. Valladares, Federal Public Defender (C.B. Kirschner, Assistant Federal Public Defender).;

08/19/2019 **Petition for Writ of Habeas Corpus** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
08/19/2019, 09/25/2019, 01/16/2020
Petition for Writ of Habeas Corpus
Matter Continued; Petition for Writ of Habeas Corpus
Matter Heard; Petition for Writ of Habeas Corpus
Denied; Petition for Writ of Habeas Corpus
Matter Continued; Petition for Writ of Habeas Corpus
Matter Heard; Petition for Writ of Habeas Corpus
Denied; Petition for Writ of Habeas Corpus
Matter Continued; Petition for Writ of Habeas Corpus
Matter Heard; Petition for Writ of Habeas Corpus
Denied; Petition for Writ of Habeas Corpus

08/19/2019 **Response and Countermotion** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
08/19/2019, 09/25/2019
Events: 08/06/2019 Response
State's Response to Defendant s Post-Conviction Petition for Writ of Habeas Corpus (Post-Conviction) and support of the State s Motion to Dismiss
Matter Continued; State's Response to Defendant s Post-Conviction Petition for Writ of Habeas Corpus (Post-Conviction) and support of the State s Motion to Dismiss
Off Calendar;
Matter Continued; State's Response to Defendant s Post-Conviction Petition for Writ of Habeas Corpus (Post-Conviction) and support of the State s Motion to Dismiss
Off Calendar;

08/19/2019 **All Pending Motions** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
All Pending Motions (08//19/19)
Matter Heard;
Journal Entry Details:
PETITION FOR WRIT OF HABEAS CORPUS...STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND SUPPORT OF THE STATE'S MOTION TO DISMISS Petitioner/Deft. TYRONE not present, in the Nevada Department of Correction (NDC). Upon Court's inquiry of Deft's request for a stay, State objected to a stay and did not see the request for a stay. State further noted this was time barred and the evidence they are seeking is not relevant to this case. Ms. Kirschner noted they were asking for different testing and this was previously continued because it was pre-mature. COURT ORDERED, Briefing schedule; State's opposition by 09/11/19, Deft's reply by 09/18/19 and Hearing SET. NDC- (C265506) 09/25/19 9:00 AM PETITION FOR WRIT OF HABEAS CORPUS...STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND SUPPORT OF THE STATE'S MOTION TO DISMISS ;

09/25/2019 **All Pending Motions** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
All Pending Motions (09/25/19)
Matter Heard; All Pending Motions (09/25/19)
Journal Entry Details:
PETITION FOR WRIT OF HABEAS CORPUS...STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ANS SUPPORT OF THE STATE'S MOTION TO DISMISS Petitioner, JAMES, SR. not present, in the Nevada Department of Corrections (NDC). Ms. Kirschner noted the genetic marker testing has happened the sexual assault kit was preserved. State argued nothing from the testing would change the writ and further noted the Deft. invoked a speedy trial without the test and now wants the kit tested because another individual tested positive to this kit, however the victim knew the Deft. COURT ORDERED, Motion for Stay, GRANTED. FURTHER, Petition and Motion to Dismiss, OFF CALENDAR. COURT ORDERED, Matter SET for a status check regarding the status of the stay and to reset the Petition. 11/25/19 9:00 AM STATUS CHECK RE: STATUS OF STAY & RESET PETITION ;

11/25/2019 **Status Check** (9:00 AM) (Judicial Officer: Israel, Ronald J.)
11/25/2019, 01/13/2020
Status Check: Status of Stay // Reset Petition for Writ

MINUTES
Matter Continued;
Continued for Chambers Decision;
Journal Entry Details:
Argument by counsel. Colloquy regarding the petition being time-barred. Court advised counsel that it would review the Schlup vs. Delo case and issue a decision from chambers. ;
Matter Continued;
Continued for Chambers Decision;
Journal Entry Details:
Deft. not present. Colloquy. Upon State's request, briefing schedule SET. State's response due by end of business day 12/9/19; Deft's reply due by end of business day 12/23/19. FURTHER, matter CONTINUED. NDC CONTINUED TO: 1/3/20 9:00 AM;

SCHEDULED HEARINGS
Decision (01/16/2020 at 3:00 AM) (Judicial Officer: Israel, Ronald J.)

01/16/2020 **Decision** (3:00 AM) (Judicial Officer: Israel, Ronald J.)
Decision Made;

01/16/2020 **All Pending Motions** (3:00 AM) (Judicial Officer: Israel, Ronald J.)
All Pending Motions (01/16/2020)
Matter Heard; All Pending Motions (01/16/2020)
Journal Entry Details:

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.;

DATE	FINANCIAL INFORMATION	
	Defendant Williams, Brian	
	Total Charges	24.00
	Total Payments and Credits	24.00
	Balance Due as of 3/26/2020	**0.00**

DISTRICT COURT CIVIL COVER SHEET

Clark County, Nevada

Case No. _____

(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Tyrone David James, Sr., No. 1063523	Brian Williams, Warden and the ATTORNEY
High Desert State Prison	GENERAL for the STATE OF NEVADA, et al.
PO Box 650	
Indian Springs, NV 89018	
Attorney (name/address/phone):	**Attorney (name/address/phone):**
C.B. Kirschner	Steve Wolfson, Clark County District Attorney
Assistant Federal Public Defender	200 Lewis Ave., Las Vegas, NV 89101, (702) 671-2500
411 E. Bonneville Ave., Suite 250, Las Vegas, NV 89101	cc: Geordon Goebel, Deputy Attorney General
(702) 388-6577	100 N. Carson Street, Carson City, NV 89701

CASE NO: A-19-797521-W
Department 24

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
■ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		☐ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

6/27/2019
Date

/s/C.B. Kirschner
Signature of initiating party or representative

See other side for family-related case filings.

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	■ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ 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:
>
> (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-19-797521-W

STEVEN B. WOLFSON
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BY
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hjc/SVU

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
Clark County District Attorney
Nevada Bar #001565
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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	■ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ 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:
>
> (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-19-797521-W

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

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

hjc/SVU

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**June 28, 2019**

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

June 28, 2019	**3:00 AM**	**Minute Order**	**Minute Order - Assignment to Department 28**

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor 116

COURT CLERK: Alan Castle

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- IT HAS COME to the attention of the Court that a Petition for Writ of Habeas Corpus was assigned a civil case number and assigned to Department 24 under Case number A-19-797521-W, TYRONE DAVID JAMES Sr. v. BRIAN WILLIAMS, et. al.

Petitioner has filed a new action and entitles the pleading a Petition for Writ of Habeas Corpus (Post-Conviction). It appears the Petition is challenging the constitutionality of the Nevada revised Statutes under which he was prosecuted, which this Court interprets as a challenge to his Judgment of Conviction pursuant to NRS 34.720 to NRS 34.830.

As NRS 34.730(b) requires that challenges to the Judgment of Conviction be assigned whenever possible to the original Judge or Court, it appears this matter has been incorrectly assigned to Department 24, rather than assigned to the Department assigned to Petitioner's underlying criminal matter: 10C265506, which was resolved by Department 28.

COURT ORDERED, District Court Clerk's office to file all documents erroneously filed in A-19-

797521-W in the correct case 10C265506, pursuant to NRS 34.730(3)(b), COURT FURTHER ORDERS, CASE No. A-19-797521-W CLOSED.

CLERK'S NOTE: The above minute order has been distributed to: Rene L. Valladares, Federal Public Defender (C.B. Kirschner, Assistant Federal Public Defender).

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**August 19, 2019**

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

August 19, 2019 **9:00 AM** **All Pending Motions**

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

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Kirschner, Courtney	Attorney
Sweetin, James R	Attorney

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS...STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND SUPPORT OF THE STATE'S MOTION TO DISMISS

Petitioner/Deft. TYRONE not present, in the Nevada Department of Correction (NDC). Upon Court's inquiry of Deft's request for a stay, State objected to a stay and did not see the request for a stay. State further noted this was time barred and the evidence they are seeking is not relevant to this case. Ms. Kirschner noted they were asking for different testing and this was previously continued because it was pre-mature. COURT ORDERED, Briefing schedule; State's opposition by 09/11/19, Deft's reply by 09/18/19 and Hearing SET.

NDC- (C265506)

09/25/19 9:00 AM PETITION FOR WRIT OF HABEAS CORPUS...STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND SUPPORT OF THE STATE'S MOTION TO DISMISS

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**September 25, 2019**

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

September 25, 2019	**9:00 AM**	**All Pending Motions**	**All Pending Motions (09/25/19)**

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

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Kirschner, Courtney	Attorney
Sweetin, James R	Attorney

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS...STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ANS SUPPORT OF THE STATE'S MOTION TO DISMISS

Petitioner, JAMES, SR. not present, in the Nevada Department of Corrections (NDC). Ms. Kirschner noted the genetic marker testing has happened the sexual assault kit was preserved. State argued nothing from the testing would change the writ and further noted the Deft. invoked a speedy trial without the test and now wants the kit tested because another individual tested positive to this kit, however the victim knew the Deft. COURT ORDERED, Motion for Stay, GRANTED. FURTHER, Petition and Motion to Dismiss, OFF CALENDAR. COURT ORDERED, Matter SET for a status check regarding the status of the stay and to reset the Petition.

11/25/19 9:00 AM STATUS CHECK RE: STATUS OF STAY & RESET PETITION

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**November 25, 2019**

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

November 25, 2019 9:00 AM Status Check

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

COURT CLERK: Michaela Tapia

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Kirschner, Courtney	Attorney
Sweetin, James R	Attorney

JOURNAL ENTRIES

- Deft. not present.

Colloquy. Upon State's request, briefing schedule SET. State's response due by end of business day 12/9/19; Deft's reply due by end of business day 12/23/19. FURTHER, matter CONTINUED.

NDC

CONTINUED TO: 1/3/20 9:00 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**January 13, 2020**

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

January 13, 2020 **9:00 AM** **Status Check**

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

COURT CLERK: Jill Chambers

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Kirschner, Courtney	Attorney
Sweetin, James R	Attorney

JOURNAL ENTRIES

- Argument by counsel. Colloquy regarding the petition being time-barred. Court advised counsel that it would review the Schlup vs. Delo case and issue a decision from chambers.

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	**3:00 AM**	**All Pending Motions**	**All Pending Motions (01/16/2020)**

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

COURT CLERK: Kathy Thomas

RECORDER:

REPORTER:

PARTIES PRESENT:

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.

Certification of Copy

State of Nevada
County of Clark } **SS:**

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES

TYRONE DAVID JAMES, SR.,

Plaintiff(s),

vs.

BRIAN WILLIAMS, WARDEN; THE ATTORNEY GENERAL FOR THE STATE OF NEVADA,

Defendant(s),

Case No: A-19-797521-W

Dept No: XXVIII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 26 day of March 2020.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk