IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE DAVID JAMES, SR., Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 80902 & 80907

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Post-Conviction Petition Requesting Genetic Marker Analysis & Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Nevada Supreme Court pursuant to NRAP 17(b)(3) because it is a post-conviction appeal and involves convictions for category A felonies.

STATEMENT OF THE ISSUES

1. Whether the district court erred by denying Appellant's Post-conviction Petition Requesting a Genetic Marker Analysis?
2. Whether the district court erred by dismissing Appellant's post-conviction Petition for Writ of Habeas Corpus?

STATEMENT OF THE CASE

On May 18, 2010, the State filed a Criminal Complaint charging Tyrone D. James, a.k.a James D. Tyrone ("Appellant") with: with two (2) counts of Sexual Assault with a Minor Under Sixteen Years of Age; and one (1) count of Battery with Intent to Commit a Crime. Appellant's Appendix ("AA") 01-02. The State later filed a Criminal Complaint charging Appellant with: two (2) counts of Sexual Assault with a Minor Under Sixteen Years of Age; two (2) counts of Open or Gross Lewdness; and one (1) count of Battery with Intent to Commit a Crime. AA 03-04.

On June 23, 2010, the State filed an Information charging Appellant with two (2) counts of Sexual Assault with a Minor Under Sixteen Years of Age (Category A Felony); two (2) counts of Open or Gross Lewdness (Gross Misdemeanor); and one (1) count of Battery with Intent to Commit a Crime (Category A Felony). IV AA 779.

On August 16, 2010, the State filed a Motion to Admit Evidence of Other Crimes, Wrongs or Acts. IV AA 779. On August 25, 2010, Appellant filed his Opposition. On September 8, 2010, Appellant 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. Id. On September 10, 2010, the State filed its Opposition to Appellant's Motion in open court and the district court conducted a Petrocelli hearing regarding the bad acts motion. Id. The district court granted both

Motions. Id. On September 17, 2010, Appellant filed a Motion to Reconsider Motion to Admit Evidence of Other Crimes, Wrongs or Acts. Id. The district court denied Appellant's Motion on September 21, 2010. Id.

Appellant's jury trial commenced on September 21, 2010. I AA 05. On September 23, 2010, the jury found Appellant guilty on all counts. III AA 597-98.

On January 19, 2011, the district court sentenced Appellant as follows: Count 1 – a maximum term of life with a minimum parole eligibility after twenty-five (25) years in the Nevada Department of Corrections ("NDOC"); Count 3 – a maximum term of life with a minimum parole eligibility after twenty-five (25) in NDOC, concurrent with Count 1; Count 5 – a maximum term of Life with a Minimum parole eligibility after two (2) years in NDOC, concurrent with Counts 1 and 3, with two hundred fifty (250) days credit for time served. III 599-601. The district court dismissed Counts 2 and 4, as they were lesser-included offenses of Counts 1 and 3 and ordered a sentence of lifetime supervision to be imposed upon Appellant's release from any term of probation, parole, or imprisonment. III AA 600-01. The Judgment of Conviction was filed on February 9, 2011. III AA 599-601.

On March 7, 2011, Appellant filed a Notice of Appeal. IV AA 780. On October 31, 2012, this Court issued an Order of Affirmance; Remittitur issued on November 26, 2012. Respondent's Appendix ("RA") 11-30.

On March 14, 2013, Appellant filed a post-conviction Petition for Writ of Habeas Corpus and Motion to Appoint Counsel. IV AA 780. The State filed its Response to Appellant's Petition on May 7, 2013. On May 20, 2013, Robert Langford Esq., was appointed as counsel. IV AA 780. On September 4, 2015, Appellant filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus. IV AA 780. On January 15, 2016, Appellant filed another Supplement to Supplemental Petition for Writ of Habeas Corpus. IV AA 780. On April 21, 2016, the State filed its Response to Appellant's Second Supplement. IV AA 780. On October 3, 2016, this Court held an evidentiary hearing and heard sworn testimony from Bryan Cox, Esq., and Dr. Joyce Adams. RA 31-69. On November 8, 2016, this Court entered its Findings of Fact, Conclusions of Law, and Order denying the Petition. III AA 658. On December 8, 2016, Appellant filed a Notice of Appeal from the denial. IV AA 780. The Nevada Court of Appeals affirmed the denial on November 14, 2017. Remittitur issued December 29, 2017. IV AA 780.

Appellant filed another Petition for Writ of Habeas Corpus (Post-Conviction) ("Second Petition") on June 27, 2019. III AA 610-30. Appellant then 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. III AA 642-50. The State filed its Response to the Genetic Marker Petition on July 23, 2019. III AA 651-55. The State filed its

Response to the Second Petition and Motion to Dismiss on August 6, 2019. III AA 672-91. On August 8, 2019, this Court signed an Order requiring the Las Vegas Metropolitan Police Department ("LVMPD") 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. III AA 697-699.

Appellant filed a Motion for Stay of his Second Petition on August 8, 2019. III AA 692-96. On August 19, 2019, the district court heard the Second Petition, noting the Motion for Stay and setting a briefing schedule. III AA 700. The State filed its Response on September 4, 2019. III AA 701-705. Appellant filed a Reply on September 10, 2019. III AA 706-11. On September 25, 2019, the district court granted the Motion for Stay and continued all pending motions again until November 25, 2019. III AA 712. The State filed a Supplemental Response to Appellant's Petition Requesting a Genetic Marker Analysis of Evidence within the Possession or Custody of the State of Nevada (NRS 176.0918). III AA 714-30. Appellant filed a Reply on December 12, 2019. III AA 731-43. On January 16, 2020, the district court denied the Petitions. IV AA 776. On February 26, 2020, the district court filed two (2) separate Notice of Entry of Findings of Fact, Conclusions of Law and Order in the A-19-797521-W and 10C2665506. IV AA 797-836

Appellant filed Notices of Appeal on March 24, 2020 IV AA 837-40. On September 28, 2020, Appellant filed his Opening Brief.

STATEMENT OF THE FACTS

On May 14, 2010, fifteen year old T.H. was home alone sleeping when she awoke to find Appellant in her house. II AA 298-302. T.H. knew Appellant because he was involved in a dating relationship with T.H.'s mother, Theresa Allen ("Theresa"). II AA 293.

T.H. testified that while she was in her bedroom, she heard a noise and then Appellant came into her bedroom and jumped on top of her. II AA 302-04. When Appellant jumped on top of T.H., she was trying to call her mother on her cell phone. II AA 304. T.H.'s cell phone fell on the side of the bed and Appellant picked it up and put it in his pocket. Id. T.H. then moved to her sister's bed, which was next to hers, and Appellant again jumped on top of her and began to choke her. II AA 305. When T.H. began to scream and cry, Appellant told her to shut up or he would snap her neck. Id. After Appellant jumped on top of T.H., he took off her shirt and underwear and pulled her into the living room. Id. Once in the living room Appellant made T.H. lay on the floor and he sat on top of her. II AA 306-07. While Appellant was on top of T.H., he continued choking her. Id. With his hand around her neck, Appellant opened up T.H.'s legs and stuck his finger in her vagina. II AA 306-07. T.H. noticed that Appellant had a glove on the hand he used to digitally

penetrate her vagina. II AA 307-08. Appellant then pulled his penis out from his pants and rubbed it inside T.H.'s vagina. II AA 309-11. T.H. could not see Appellant's penis but she felt something rubbing the inside of her vagina. II AA 310.

T.H. testified that once Appellant stopped rubbing his penis in her vagina, he told her to get up and sit on the couch. II AA 311. Then, Appellant asked her why she did not like him. II AA 311-12. Afterwards, T.H. got dressed and Appellant drove her to school. II AA 312. During the ride, Appellant asked T.H. who she was going to tell and if she wanted him to buy her a new case for her cell phone. II AA 313. T.H.'s phone case broke when it fell in her bedroom. Id. As soon as T.H. arrived at school she texted her sister and told her what happened. II AA 314, 351-68. T.H.'s sister then told their mother what happened. II AA 314, 355.

Theresa immediately called T.H., who was still at school. II AA 378. T.H. picked up the phone crying. Id. Because she was in class, T.H.'s teacher told her to hang up the phone. Id. Theresa asked to speak to T.H.'s teacher and had T.H. sent to the office where Theresa could pick her up. II AA 378-79. When Theresa picked T.H. up from school, T.H. was crying so hard that she was "gasping for air." II AA 381-82. Once T.H. and Theresa were alone in their car, T.H. was able to tell Theresa what happened. II AA 381-82, 384.

After T.H. told Theresa what happened, Theresa called Appellant and told him what T.H. had said. II AA 384-85. Appellant accused T.H. of lying and asked

Theresa where he could meet her. II AA 385. She told Appellant to meet her at the house. Id. When Appellant came to the house, Theresa met him outside. II AA 386. Appellant continued accusing T.H. of lying. Id. T.H. looked Appellant in the face and told him exactly what she told Theresa he had done to her. II AA 385-86. After her conversation with Appellant, Theresa called the police. II AA 387.

Theresa testified that she had spoken to Appellant earlier that day because he was supposed to pay her power bill for her. II AA 373-74. However, despite Appellant's contentions that he went to her house to drop off his dog and pick up the power bill, Theresa testified that she never gave Appellant permission to go into her home that day for either purpose. II AA 372-74. Theresa testified that there was no reason whatsoever for Appellant to go to her home. II AA 374.

Theresa testified that after the incident T.H. did not want to stay at the house so they stayed with family members for a few weeks. II AA 392-93. About a week after the assault, Theresa went to the home to get more clothes and shoes. II AA 391-92. While looking under her bed for her shoes she found a box of rubber gloves, exactly the kind that T.H. had described Appellant wearing during the assault. Id. Theresa contacted police who collected the gloves. II AA 394. Theresa testified that T.H.'s behavior drastically changed after the assault; she did not want to sleep at home and Theresa had to sleep in the living room with her once they did return home. II AA 394-96.

Officer Erik Meltzer, with the Las Vegas Metropolitan Police Department ("LVMPD"), was the officer dispatched to a call regarding the sexual assault of T.H. II AA 410-13. Officer Meltzer made contact with Theresa and the victim; after speaking with the victim, Officer Meltzer contacted Sexual Assault Detective Tomaino. II AA 413. As a patrol officer, when someone discloses sexual abuse, he calls a detective. II AA 414. The Detective instructed Officer Meltzer to transport the victim to Sunrise Hospital; Officer Meltzer did transport the victim and her mother to said Hospital. II AA 415. Detective Timothy Hatchett, with LVMPD, testified that he worked with Detective Tomaino[1] on the instant matter. II AA 422-23. According to Detective Hatchett, Appellant agreed to speak with the Detectives. II AA 424.

Dr. Theresa Vergara ("Dr. Vergara") examined T.H. after the assault and that a rape kit was conducted, which involved swabbing the genitalia for collection. II AA 435, 440, 442. According to Dr. Vergara, T.H. had no bruising to the external genitalia. II AA 443-44. However, there was generalized swelling to the introitus (vaginal opening), which could be caused from trauma. Id. Dr. Vergara testified that while other things, such as a urinary tract infection could cause the swelling, the findings were consistent with T.H.'s complaint of sexual assault. II AA 444. However, Dr. Vergara testified that the findings were categorized as "non-specific

[1] Detective Tomaino also testified at trial. II AA 255.

findings." II AA 450.

At trial, pursuant to the State's Motion to Admit Other Bad ACTS, N.F. also testified about Appellant sexually assaulting her. N.F. met Appellant when she was a little girl because he was married to her mother Tanisha. II AA 472. Tanisha and Appellant divorced when N.F. was twelve years old after he was caught touching her inappropriately. II AA 474. One night Appellant came into her bedroom around midnight. II AA 477. Appellant took N.F. to another room and told her that he felt like "someone was touching" her. II AA 478. Appellant instructed N.F. to lay on the bed and removed her pants. II AA 478-79. Then, Appellant inserted his finger in her vagina. II AA 478. N.F. told Appellant to stop, which he did. II AA 479. Once Appellant stopped, he told N.F. to go back to her room. Id. During another incident, Appellant entered N.F.'s room again around midnight, while she was sleeping. II AA 484-85. Appellant jerked N.F. out of her bed and took her into the same room as the previous time. II AA 485-86. Appellant put N.F. on the bed and pulled her pants off. II AA 486. N.F. could feel Appellant's penis on her leg. Id. N.F. kept telling Appellant to stop. Id. When N.F. tried to yell for help, Appellant threatened to kill her family. Id. Appellant tried inserting his penis in N.F.'s vagina but was unsuccessful because it would not fit. II AA 487. Appellant then inserted his penis in N.F.'s butt. Id. N.F. again asked Appellant to stop, which he did. Id.

During a third incident, N.F. was in the house with only Appellant and her

younger sister; her mother had left for work. II AA 479. Appellant was chasing N.F. around the house and they ended up in the living room. II AA 479-80. N.F. and Appellant started to play wrestle but Appellant began to get aggressive. Id. Every time N.F. tried to get up Appellant would pull her back down. Id. N.F. kept telling Appellant to leave her alone. Id. Eventually Appellant let her go and told her to get in the shower. Id. N.F. stated that she did not want to get in the shower, but Appellant insisted stating that he was not going to do anything to her. Id. N.F. went into the bathroom and Appellant locked the door stating, "See, I'm not going to do anything to you." II AA 481. While N.F. was in the shower she heard a pop at the door and saw Appellant enter the bathroom. Id. Appellant told her to put her foot on top of the bathtub. Id. N.F. refused and Appellant kept persisting. Id. Scared that Appellant might hurt her, N.F. put her foot on top of the bathtub and Appellant inserted his fingers into her vagina. II AA 482. When N.F. tried calling for help, Appellant put his hands on her neck to try to shut her up. II AA 483. Afterwards, Appellant instructed N.F. to get out of the shower. II AA 482. Appellant picked N.F. up and put her on the floor on her back. Id. Appellant got up top of her and attempted to insert his penis into her vagina but was unable to because it would not fit. Id.

During the last incident, Appellant entered N.F.'s room while she was laying on her bed. II AA 488. Appellant attempted to pull her pants off. II AA 488-89. While Appellant was trying to pull her pants off, his mother Carol came into N.F.'s

bedroom. II AA 489. Appellant jumped off the bed and hid in N.F.'s closet. II AA 490. Carol began screaming to Tanisha that Appellant was touching N.F. Id. Tanisha told Appellant to get out of her house and took N.F. to Southwest Medical, where N.F. eventually talked to the police. II AA 492.

SUMMARY OF THE ARGUMENT

The district court did not err in denying Appellant's Post-conviction Petition Requesting a Genetic Marker Analysis as Appellant failed to show that there was a reasonable possibility that he would not have been convicted or prosecuted if the results had been obtained through a genetic marker analysis.

Furthermore, the district court did not err in denying Appellant's Second Post-Conviction Petition for Writ of Habeas Corpus. The Second Petition was untimely, and Appellant conceded that his Second Petition was successive. Moreover, Appellant failed to show good cause and prejudice in order to overcome the procedural bars. Appellant's claims of actual innocence and that there was a Brady v. Maryland violation cannot provide support for his argument of good cause and prejudice. Finally, Appellant's additional claims, as raised in the Second Petition, were meritless.

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ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S POST-CONVICTION PETITION REQUESTING A GENETIC MARKER ANALYSIS

Appellant claims that the district court erred in denying his Genetic Marker Petition, and that there is a "reasonable possibility" that the jury would not have convicted him if they knew that a sperm fraction, found on the victim, did not match him. AOB 09-10.

NRS 176.0918 states as follows:

> 1. A person convicted of a felony who otherwise meets the requirements of this section may file a postconviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment of conviction. If the case involves a sentence of death, the petition must include, without limitation, the date scheduled for the execution, if it has been scheduled.
>
> 2. Such a petition must be filed with the clerk of the district court for the county in which the petitioner was convicted on a form prescribed by the Department of Corrections. A copy of the petition must be served by registered mail upon:
>
> (a) The Attorney General; and
>
> (b) The district attorney in the county in which the petitioner was convicted.
>
> 3. A petition filed pursuant to this section must be accompanied by a declaration under penalty of perjury attesting that the information contained in the petition does not contain any material misrepresentation of fact and that the petitioner has a good faith basis relying on particular facts for the request. The petition must include, without limitation:

(a) Information identifying specific evidence either known or believed to be in the possession or custody of the State that can be subject to genetic marker analysis;
(b) The rationale for why a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in paragraph (a);
(c) An identification of the type of genetic marker analysis the petitioner is requesting to be conducted on the evidence identified in paragraph (a);
(d) If applicable, the results of all prior genetic marker analysis performed on evidence in the trial which resulted in the petitioner's conviction; and
(e) A statement that the type of genetic marker analysis the petitioner is requesting was not available at the time of trial or, if it was available, that the failure to request genetic marker analysis before the petitioner was convicted was not a result of a strategic or tactical decision as part of the representation of the petitioner at the trial.

4. If a petition is filed pursuant to this section, the court may:
(a) Enter an order dismissing the petition without a hearing if the court determines, based on the information contained in the petition, that the petitioner does not meet the requirements set forth in this section;
(b) After determining whether the petitioner is indigent pursuant to NRS 171.188 and whether counsel was appointed in the case which resulted in the conviction, appoint counsel for the limited purpose of reviewing, supplementing and presenting the petition to the court; or
(c) Schedule a hearing on the petition. If the court schedules a hearing on the petition, the court shall determine which person or agency has possession or custody of the evidence and shall immediately issue an order requiring, during the pendency of the proceeding, each person or agency in possession or custody of the evidence to:
(1) Preserve all evidence within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section;

(2) Within 90 days, prepare an inventory of all evidence relevant to the claims in the petition within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section; and
(3) Within 90 days, submit a copy of the inventory to the petitioner, the prosecuting attorney and the court.

5. Within 90 days after the inventory of all evidence is prepared pursuant to subsection 4, the prosecuting attorney may file a written response to the petition with the court.

6. If the court holds a hearing on a petition filed pursuant to this section, the hearing must be presided over by the judge who conducted the trial that resulted in the conviction of the petitioner, unless that judge is unavailable. Any evidence presented at the hearing by affidavit must be served on the opposing party at least 15 days before the hearing.

7. If a petitioner files a petition pursuant to this section, the court schedules a hearing on the petition and a victim of the crime for which the petitioner was convicted has requested notice pursuant to NRS 178.5698, the district attorney in the county in which the petitioner was convicted shall provide to the victim notice of:

(a) The fact that the petitioner filed a petition pursuant to this section;
(b) The time and place of the hearing scheduled by the court as a result of the petition; and
(c) The outcome of any hearing on the petition.

Additionally, pursuant to NRS 176.09183:

1. The court shall order a genetic marker analysis, after considering the information contained in the petition pursuant to subsection 3 of NRS 176.0918 and any other evidence, if the court finds that:

(a) The evidence to be analyzed exists;
(b) Except as otherwise provided in subsection 2, the evidence was not previously subjected to a genetic marker analysis, including, without limitation, because such an analysis was not available at the time of trial; and
(c) One or more of the following situations applies:

(1) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if

> exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;
> …

Appellant claims that the State "opted not to address the requirements of NRS 176.09183 in its supplemental response" and, instead, responded as though both Petitions were related. See AOB 12. Appellant's claim is meritless. In both the Second Petition and Genetic Marker Petition, Appellant argued that the CODIS report constituted newly discovered exculpatory evidence, and if this evidence had been presented at trial the jury would not have found him guilty. III AA 617-19, 739-40. Accordingly, the two (2) petitions are related.

Regardless, as the State argued before the district court in its response, Appellant failed to meet the requirements for genetic marker testing under NRS 176.09183. According to the district court:

> I'm trying to give you as detailed a decision as I can and as I say all the time if I'm wrong you have remedies I read this stuff thoroughly and although I don't write it out which maybe I should so then when you try you know now I - all right in any event this wasn't there is no indication that this was anything other than an individual known to the victim This was not the type of case where the allegations may prove that it was some - some unknown individual. And from everything I have read on the rape shield etcetera provided to me and from the Supreme Court on this case that the fact that the victim may have had other sexual conduct would not be admissible
>
> And, therefore, although I realize that the standard is very slight it's the possibility if there is no new evidence meaning that this can't come in to show someone else the well the statute along with what I just quoted preclude the testing And therefore I'm denying the petition on that basis.

IV AA 768.

Appellant claims that any evidence from the CODIS Report would not have been barred by Nevada Rape Shield Laws, and the State's argument was based upon speculation. AOB 14. The Nevada Rape Shield Law recognizes that there may be no relationship between prior sexual conduct and the victim's ability to relate the truth and that whether a victim has previously consented to sexual activity under different circumstances may have little or no relevance to the issue of her consent to the activities which resulted in the rape prosecution. Lane v. State, 104 Nev. 427, 720 P.2d 1245 (1988). Evidence of prior sexual conduct is not identified as exculpatory evidence until after the accused submits the issue of consent to the court and the court determines, after a hearing on the matter, that the evidence is more probative than prejudicial. Id.; NRS 48.069.

The State of Nevada, joining a vast majority of jurisdictions, passed statutes limiting the admissibility at trial of evidence concerning the sexual history of a complaining witness in a rape or sexual assault case. To this end, NRS 50.090 prohibits the accused from impeaching a rape victim's credibility with evidence of her prior sexual conduct, unless the victim has testified regarding her sexual history or the prosecution has presented evidence regarding the victim's prior sexual conduct. NRS 50.090 and NRS 48.069 expressly limit the admission of such

evidence to prosecutions. Because prosecution of a case does not exist until charges are filed, see Ryan v. District Court, 88 Nev. 638, 503 P.2d 842 (1972), evidence of prior sexual conduct is not admissible under NRS 48.069 and 50.090 and cannot become legal evidence within the meaning of NRS 172.135(2), until on motion a district court rules it to be such following the return of the indictment. See NRS 172.005. Consequently, this evidence is inadmissible.

Furthermore, this Court has consistently held that when a defendant in a sexual assault case desires to cross-examine a victim about prior allegations of sexual assault in an effort to paint those prior allegations as false, he has a requisite burden: a defendant must prove by a preponderance of the evidence in a hearing outside the presence of the jury that: 1) the accusations were made; 2) the accusations were in fact false; and 3) that the evidence is more probative than prejudicial. State v. Miller, 105 Nev 497, 502, 779 P.2d 87, 90 (1989); State v. Brown, 107 Nev. 164, 165, 807 P.2d 1379, 1380 (1991). Upon such a showing, the trial court is to permit cross examination of the victim and upon denial or failure of memory, can permit extrinsic evidence. Miller 105 Nev at 502, 779 P.2d 87 at 90. This Court discussed a defendant's burden in Brown, *supra*. Proof of falsity must be something more than a bare unsupported opinion that the complaining witness is lying. Brown, 107 Nev. at 166, 807 P.2d at 1380. Before a sexual assault defendant can commence cross-examination of a victim as to prior complaints of sexual

misconduct, he must provide some independent basis that the accusations are false. Id. Moreover, without a showing that the prior complaints are false, they become irrelevant. Brown, 107 Nev. at 168-169, 807 P.2d at 1381-82. As an aside, there is no violation a sexual assault defendant's Sixth Amendment Right to Confrontation by refusing to permit cross-examination regarding prior complaints when a defendant has not met the Miller burden at a hearing. Id.

Here, there is no evidence of a prior false allegation and this Court has already found that evidence of T.H.'s sexual history was properly excluded. RA 17-18. Additionally, there was no issue, or defense presented, of consent. The only value of this evidence would have been to impeach the victim, but this type of evidence, as stated *supra,* is barred.

Next, Appellant repeatedly asserts that he would have not been convicted, "given the exculpatory DNA evidence because there was no physical evidence connecting him to the crime." AOB 15. However, Appellant failed to show that there was a reasonable possibility that he would not have been prosecuted or convicted. This was not an identity case. There was sufficient independent evidence to show that Appellant committed the crimes as charged. First, T.H. testified that Appellant began to choke her, after he jumped on top of her. II AA 305. Then, Appellant pulled her into the living room, made her lay on the floor, and sat on top of her. II AA 306-07. Appellant opened her legs and stuck his finger in her vagina; T.H. noticed that

Appellant had a glove on that hand. II AA 306-08. Then, Appellant pulled out his penis and rubbed it inside T.H.'s vagina; even though she could not see his penis, she felt something rubbing the inside of her vagina. II AA 309-11. Regardless, there was no evidence nor any allegation that Appellant ejaculated inside the victim. II AA 306-311.

Even Appellant testified that he was at the home on the day of the incident, claiming that he was dropping off his dog and picking up the power bill. III AA 534. Appellant also testified that he had an interaction with the victim, as he claimed he was surprised she was home, and that he did give her a ride to school. III AA 534-35. Moreover, T.H.'s mom testified that she found latex gloves in a shoe box under her bed, that she had not seen those gloves before, and the shoe box was from a pair of shoes that Appellant purchased. II AA 391-92. Theresa testified that she had not purchased those gloves, nor did she bring them into her house. II AA 392. Appellant also testified that he used gloves at his job, for cleaning. III AA 542.

In addition to this testimony, the State had N.F. testify about previous incidents where Appellant committed sexual assaults against her. During one incident, Appellant digitally penetrated N.F. II AA 478. N.F. testified about another incident where Appellant tried to insert his penis into her vagina but was unsuccessful; he then inserted his penis into her butt. II AA 487. During a third incident, Appellant proceeded to digitally penetrated N.F., while she was in the

bathroom, after instructing her to put her foot on top of the bathtub. II AA 481-82. Appellant later instructed her to get out the shower; he proceeded to pick N.F. up, put her on her back, on the floor, and attempted to insert his penis into her vagina. II AA 482-83. Finally, N.F. testified that Appellant attempted to pull her pants off, but his mother came into the bedroom and began screaming that Appellant was touching N.F. II AA 488-90. With the damaging testimony of the victim, and past incidents involving a different victim, Appellant cannot now claim that there was a reasonable possibility he would not have been convicted.

Moreover, as defense counsel explained, at the Evidentiary hearing,

> this case didn't turn on I believe physical evidence. The conclusions were not conclusive as to sex assault and the report itself provided an alternative explanation. I believed form my experience that the nurse examiner would admit that it was not conclusive evidence of sex assault and that the urinary tract infection would be responsible for it. And, if I recall, I was successful in getting that evidence in.

RA 40-41. Defense counsel's account of the trial, during the evidentiary hearing, was accurate as he elicited testimony from Dr. Vergara that an alternative cause of the swelling could have been from a urinary tract infection or Strep agalactiae, both of which was present in the victim.[2] II AA 447-48, 450-51, 453 Even in closing arguments, defense counsel argued before the jury that there was no physical evidence. III AA 564. Accordingly, the jury was presented with this testimony, and

[2] Dr. Vergara also testified that it this type of bacteria is common in women. II AA 452.

heard Appellant's argument at trial. Ultimately, the jury found Appellant guilty without DNA evidence.

Finally, Appellant attempts to claim that the State conceded that his Petition for Genetic Marker Testing should have been granted. AOB 17-18. The State did not make any concession. The State pointed out that the CODIS hit, itself, was not reliable to support Appellant's misguided claim that this was exculpatory evidence. Moreover, the information in the CODIS report was not conclusive as confirmation testing was needed. V AA 842-43. Therefore, whether there were other sources of male DNA found on T.H.'s person is irrelevant, given her firm identification of Appellant and her consistent account of the assault. RA 11. For these reasons, the district court did not err in denying Appellant's Genetic Marker Petition.

II. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S SECOND POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

This Court gives deference to a district court's factual findings in habeas matters but reviews the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013).

A. Appellant's Petition was Procedurally Barred as Untimely and Successive.

The district court properly found that Appellant's Second Petition was procedurally barred. IV AA 801-15. First, the Second Petition was time-barred. 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.

This Court 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). 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), this 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, this 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. (emphasis added).

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. This 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; Remittitur from the direct appeal issued November 26, 2012. III AA 599-601; RA 29. Thus, the one-year time bar began to run from the date of Remittitur. The instant Second Petition was not filed until June 27, 2019. III AA 610. This is approximately seven (7) and a half years after Remittitur issued—far in excess of the one-year time frame. Appellant did not deny that his Second Petition was untimely. III AA 620. Therefore, the district court properly found that the Second Petition was untimely.

Moreover, the Second Petition was 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.

(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); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

This 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. This 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, 497–98 (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 Appellant's Second Petition. Appellant did not deny that it is successive. III AA 612-15, 617. AOB 19. The Second Petition raised only new and different grounds that could and should have been raised at an earlier, appropriate time. NRS 34.810(2). Accordingly, the district court properly denied the Second Petition as it was successive and time-barred.

B. Appellant Failed to Establish Good Cause and Prejudice to Overcome the Procedural Bars.

According to Appellant, he had good cause to raise his claims because there was "new evidence demonstrating his actual innocence" and that there was a newly discovered Brady v. Maryland violation. AOB 19, 24. Further, Appellant claims that his actual innocence claim can establish prejudice to overcome the procedural bars. AOB 20.

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). This 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)).

1. Appellant's Actual Innocence Claim is Meritless and Cannot Overcome the Procedural Bars.

According to Appellant, no DNA evidence was presented at this trial, and "the defense did not know there was any DNA recovered from the victim's rape kit." AOB 22. Now, Appellant claims that new DNA evidence, recovered from the victim, matches a man who is not Appellant. AOB 22-23. Moreover, Appellant claims that his petition is timely, because it was filed within (1) year of discovering the new evidence that supports his actual innocence claim. AOB 23.

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). This 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 v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). 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.

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).

First, Appellant's claim that trial counsel did not know there was DNA collected from the victim's rape kit was belied by the record. Detective Tomaino testified ta trial that a rape kit had been collected. II AA 256-57. Defense counsel even cross-examined the Detective regarding this rape kit. II AA 271-72. Dr. Vergara also testified about the details of the sexual assault examination, including swabs of the victim's genitalia was collected. II AA 435, 439-43. The fact that Appellant also knew that DNA evidence has been collected does not help him overcome the time bars.

Despite Appellant's allegation that the CODIS hit, suggesting that another man's DNA was found in the victim's rape kit, is new evidence of his actual innocence, Appellant could not prove that no reasonable juror would have convicted him in light of this information. As the district court found, the evidence "is not reliable, 'exculpatory scientific evidence.' Schlup, 513 U.S. at 324, 330, 115 S.Ct. at 865, 868." IV AA 789. Appellant behaves as though the information in the "CODIS Hit Notification Report" is a conclusive match. However, the Report is clear that "further action" is needed. V AA 842-45. Therefore, the CODIS hit itself is not reliable exculpatory evidence.

Still, even if it is assumed that another man's sperm was found on the victim, this alone cannot prove that Appellant is actually innocent. Osborne, 557 U.S. at 62, 129 S. Ct. at 2316. As the district court found, "[t]here was overwhelming incriminating evidence and an explanation for the presence of any other DNA." As stated *supra,* this was not an identity case as T.H. was sexually assaulted by a person she had known for at least a year, as Appellant was dating her mother. RA 11.; II A 293-96. Testimony at trial established that Appellant assaulted T.H. in her home, and then drove her to school. II AA 298-313. Accordingly, this was not a case about identity, and identity did not need to be established through DNA. As this Court previously 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." RA 11.

Further, any other sexual activity of the victim that could have explained the presence of another man's sperm would have been barred under the rape shield laws, as was the fact in this case. See e.g., Lane v. State, 104 Nev. 427, 720 P.2d 1245; State v. Miller, 105 Nev 497, 502, 779 P.2d 87, 90; State v. Brown, 107 Nev. 164, 165, 807 P.2d 1379, 1380; NRS 48.069. This Court found that evidence of T.H.'s sexual history was properly excluded. RA 17–18. Finally, the State presented testimony from another past victim, as Appellant was alleged to have sexually assaulted another quasi-step-daughter. II AA 472-92. Said testimony was admissible

under NRS 48.045(2) because, as this Court held, it showed that Appellant had a motive and opportunity, as well as a common plan, to perpetrate sexual crimes against the teenage daughters of women he dated. RA 13. For these reasons, Appellant failed to show actual innocence and could not overcome the procedural bars.

2. Appellant Failed to Show that There was a Brady v. Maryland Violation.

Appellant claims that there was a Brady v. Maryland, 373 U.S. 83 (1963) violation because the State was in the sole possession of the rape kit and suppressed the "exculpatory evidence" by holding onto the kit for seven (7) years. AOB 24-25. Appellant again asserts that defense counsel did not know there was any DNA recovered from the victim and did not know that there was anything to test. AOB 24.

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 (3) 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).

In the post-conviction context of determining whether a Brady claim can overcome the procedural bars, this 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, 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, as the district court found, Appellant had no rights under Brady to the "new evidence" at issue here—the DNA report generated years after Appellant's conviction. IV AA 791.

Still, Appellant did not establish that there was a Brady violation. As discussed *supra,* the CODIS hit is not favorable to Appellant because there was sufficient independent evidence introduced at trial that Appellant sexually assaulted T.H.

Mazzan, 116 Nev. at 67, 993 P.2d at 37. Appellant cannot escape the fact that the victim gave consistent accounts of the assault and gave a firm identification of Appellant, whether or not there were other sources of male DNA found on her person. RA 11. Moreover, the State did not withhold the CODIS hit, and Appellant admits that when the State received the hit, it turned the information over to the Attorney General's Office, which then their office provided the information to Appellant.[3] AOB 02-03; III AA 626-27.

Furthermore, and contrary to Appellant's assertions, the existence of the rape kit itself was disclosed well before trial—and trial counsel even cross-examined witnesses about it:

> Q You didn't. Okay. But you did talk to – Did you have an opportunity to review the SANE or SAINT report after it was completed at the hospital?
>
> A Yes.
>
> …
>
> Q Are you aware as to whether or not it's possible to lift DNA from someone's body when they've had contact with somebody?
>
> A Yes.

[3] Appellant claims that when Senior Deputy Attorney General Amanda Sage contacted the Federal Public Defender's Office, it was because "new DNA evidence [had] been discovered in James' case that was potentially exculpatory." AOB 2-3. A review of Appellant's record citation shows that support for his claim, that the evidence was "potentially exculpatory[,]" is from Appellant's own "Unopposed Motion for Appointment of Counsel to Represent Petitioner[.]" However, the word "exculpatory" was not used: "Ms. Sage advised she had received information from the Clark County District Attorney regarding possibly relevant new DNA information in James's case." III AA 603.

Q Okay. It is possible?

A Yes.

Q. Are you aware in your investigation whether or not DNA was lifted from [T.H.]?

A If it was, it was during the SCAN exam.

Q Okay. Are you aware as to whether or not any evidence of [Appellant] was lifted off of [T.H.]?

A Nothing that I've been made aware of.

II AA 271, 280-81. Additionally, Dr. Vergara testified that she conducted an examination on the victim, and the victim's genitalia was swabbed. II AA 435, 439-42. 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.

Next, Appellant failed to show that the evidence was "material". Mazzan, 116 Nev. at 67, 993 P.2d at 37. As discussed *supra,* defense counsel elicited testimony at trial that Appellant's DNA had not been found on the victim. See e.g., II AA 280-81. Additionally, Appellant would not have been permitted to elicit evidence of the victim's other sexual activity pursuant to Nevada's rape shield statute, as this Court noted when it denied Appellant's direct appeal. RA 17–18. 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. As

the victim testified, Appellant 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. II AA 306-12.

Finally, Appellant's Brady claims fails because he was convicted in 2010, and the CODIS hit was generated in 2018. III AA 622. Regardless, Appellant has not established a Brady violation because this "new evidence" was neither favorable to the accused, nor withheld, nor material; therefore, this claim is insufficient to overcome the procedural bars.

3. Appellant Failed to Show that Counsel was Ineffective.

As the district court noted, Appellant claimed that he could establish good cause through his actual innocence and Brady claims. IV AA 784. However, the court found that his claims were meritless. Id. The court also found that "because [Appellant's] substantive claims are meritless, [Appellant] cannot demonstrate prejudice." Id. Appellant failed to cite to any case law that would support his contention that the district court incorrectly analyzed his substantive claims. See AOB 25-26. Therefore, this Court should decline to hear such claim as a party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's

failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Regardless, the district court properly denied Appellant's claims.

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). 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).

This 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 v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). 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).

In the instant matter, the district court found that there was no ineffective assistance of counsel. IV AA784-88. The district court also found that, given the

factors counsel was working with, it would not second-guess counsel's strategic decision not to pursue further DNA investigations. Donovan, 94 Nev. at 675, 584 P.2d at 711. As stated, before the district court, any claim that trial counsel should have had the DNA tested has been available for years and so is itself time-barred. Riker, 121 Nev. at 235, 112 P.3d at 1077. Regardless, the claims of ineffectiveness are without merit.

Here, it was not an objectively unreasonable strategy to refrain from having the DNA tested. Despite Appellant's assertion that he has consistently maintained his innocence, had a test revealed that Appellant was lying, his defense would have been severely undermined. See AOB 27. Defense counsel's 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. As the district court found, defense counsel could not have known there was no match to Appellant unless and until such a test were completed, and the potential risk of having such a test was high. IV AA 787.

Moreover, Appellant invoked his right to a speedy trial. RA 02. Just several weeks after his invocation, Appellant 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. RA 04, 08-10. Accordingly, the fact that there was likely no time for a DNA test was of Appellant's own choosing and cannot be attributed to counsel. Therefore, Appellant failed to show that counsel was ineffective.

4. Appellant Cannot Raise a Freestanding Actual Innocence Claim and Cannot Establish Actual Innocence.

As stated *supra,* Nevada state law does not recognize freestanding claims of actual innocence in a Petition for Writ of Habeas Corpus, but rather only provides for claims of actual innocence where a defendant is attempting to overcome a procedural bar caused by an untimely or successive petition. See Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006); See also Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). This is consistent with this Court's adoption of the standard established in Schlup v. Delo. See 513 U.S. 238, 315, 115 S. Ct. 851, 861 (1995) (quoting Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993)) ("Schlup's claim of innocence is thus 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."). In contrast, a freestanding claim of actual innocence is a claim wherein a petitioner alleges actual innocence alone, rather than actual innocence supported by a claim of constitutional deficiency, warrants relief. See Herrera, 506 U.S. 390, 113 S. Ct. 853 (1993). The Herrera Court acknowledged that claims of actual innocence based on newly discovered evidence have never been held as a ground for habeas relief absent an independent constitutional violation in the underlying criminal proceeding. Id. The Court noted such claims were traditionally addressed in the context of requests for executive clemency, which power exists in every state and at the federal level. Id. at 414-15,

113 S. Ct. at 867-68. However, the Court assumed, arguendo, that a federal freestanding claim of actual innocence may exist where a petitioner was sentenced to death and state law precluded any relief. Herrera, 506 U.S. at 417, 113 S. Ct. at 869; Schlup, 513 U.S. at 317, 115 S. Ct. at 862. The United States Supreme Court has never found a freestanding claim of actual innocence to be available in a non-capital case. See, e.g., Herrera, 506 U.S. at 404-405, 416-417; House v. Bell, 547 U.S. 518, 554, 126 S. Ct. 2064, 2086 (2006); see also Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997); Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000).

Appellant failed to cite any Nevada authority which would allow him to raise a freestanding claim of actual innocence and improperly raises such a claim before this Court. "Actual innocence" is a term of art that should only be raised in the context of an attempt to overcome post-conviction procedural bars to petitions for writ of habeas corpus. Even in the post-conviction context, where at least "actual innocence" claims can be made in order to have other arguments heard on the merits, there is no such concept as a "freestanding" actual innocence claim where a person can claim they deserve some kind of relief solely because they proclaim their innocence.

Regardless, as stated *supra* in Section II(B)(1), the district court properly found that Appellant's actual innocence claim is meritless and could not overcome the procedural bars.

5. Appellant Failed to Show that There was a Brady Violation.

Appellant's claims listed on page 30 of his Opening Brief are merely a recitation of his claims as stated on pages 24-25. As stated *supra* in Section II(B)(2), the district court properly found that that there was no Brady violation, and Appellant's claim is meritless. IV AA 790-92.

6. The District Court Properly Found that there was no Prosecutorial Misconduct.

As an initial matter, Appellant failed to cite to any law in support of his claim that there was prosecutorial misconduct. See AOB 30-31. Therefore, this Court should decline to review his claim. Maresca, 103 Nev. 669, 673, 748 P.2d 3, 6; Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38; Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244; Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950.

This 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, this 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.

Appellant alleged that there is "ongoing prosecutorial misconduct" because the State did not test T.H.'s rape kit for seven (7) years, did not receive the CODIS hit for another year, and has not tested two (2) of the swabs from the rape kit. AOB 30-31; III AA 626-27.

First, contrary to Appellant's assertions, the State's actions with regard to the rape kit were not improper. Valdez, 124 Nev. at 1188, 196 P.3d at 476. As established *supra,* 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.

Second, Appellant failed to show that 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, Appellant has repeatedly admitted that the District Attorney's Office provided the information to the Attorney General's Office, which then passed the information along to Appellant. AOB 31; III AA 626-27. There can be no finding that the State concealed this information. Moreover, Appellant failed to establish there was any undue delay in the handling of this information, and, again, failed to cite to any precedent supporting an argument for undue delay. Appellant could have had T.H.'s rape kit tested at any time, and the State had no duty to test evidence in a case where the jury had already found Appellant guilty and where his conviction had already been affirmed by this Court. Despite this, the State did in fact reveal the existence of the CODIS hit as soon as it received that information, which was then disclosed to Appellant.

Finally, as established in Section II(B)(1), Appellant could not 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 Appellant is irrelevant. For these reasons, the district court did not err in finding that there was no prosecutorial misconduct.

7. The District Court Properly Found that There was No Confrontation Clause Violation.

Appellant claims that he was denied the opportunity to confront T.H. about the alleged presence of male sperm on her body that matched a different man. AOB 32. However, as the State argued below, 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.

This 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 post-conviction 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).

Since Appellant did 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*, Appellant 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, the district court properly found that Appellant could not 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; therefore, his claim was waived and appropriately dismissed. IV AA 795.

Nonetheless, in a similar context, this Court held that the victim's prior sexual activity was properly excluded at trial. RA 17. Now, for similar reasons, Appellant would not have been permitted to confront T.H. with evidence from the CODIS hit. Moreover, defense counsel still cross-examined the victim about the lack of sperm present. II AA 326, 334-35. Thus, Appellant's claim was without merit, could not constitute good cause or prejudice to overcome the procedural bars, and the district court did not err in denying the Second Petition.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the district court's denial of Appellant's Post-conviction Petition Requesting a Genetic Marker Analysis and Petition for Writ of Habeas Corpus be AFFIRMED.

Dated this 28th day of October, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 12,650 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 28th day of October, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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