EIGHTH JUDICIAL DISTRICT COURT
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October 21, 2022

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. JOSEPH ALEXANDER HENDERSON
S.C. CASE: 85367
D.C. CASE: 05C212968 related case A-21-840121-W

Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated October 18, 2022, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed October 21, 2022 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

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FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
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-
JOSEPH HENDERSON,
#1502730
Defendant.

CASE NO: A-21-840121-W
05C212968
DEPT NO: I

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: AUGUST 25, 2022
TIME OF HEARING: 10:30 AM

THIS CAUSE having come on for hearing before the Honorable BITA YEAGER, District Judge, on the 2th day of August, 2022, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through STACY KOLLINS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On July 11, 2005, Joseph Henderson, (hereinafter "Petitioner") was charged by way of Information with the following: Count 1 – Conspiracy to Commit Burglary, Count 2 –

Statistically closed: USJR - CV - Summary Judgment (USSUJ)

Burglary While in Possession of a Firearm, Count 3 – Conspiracy to Commit First Degree Kidnapping, Counts 4 and 5 – First Degree Kidnapping With Use of a Deadly Weapon, Count 6 – Conspiracy to Commit Sexual Assault, Counts 7, 8, and 9 – Sexual Assault With Use of a Deadly Weapon, Count 10 – Conspiracy to Commit Robbery, Counts 11 and 12 – Robbery With Use of a Deadly Weapon, Count 13 – Open or Gross Lewdness, and Count 14 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm. On June 27, 2008, a jury found Petitioner guilty of all counts.

On August 28, 2008, Petitioner was sentenced as follows: Count 1 – twelve months in the Clark County Detention Center; Count 2 – sixty-two months to one hundred fifty-six months in the Nevada Department of Corrections ("NDOC"), to run concurrent with Count 1; Count 3 – twenty-four months to sixty months in the NDOC, to run consecutive to Count 2; Count 4 – sixty months to life in the NDOC, plus an equal and consecutive term of sixty months to life for the Use of a Deadly Weapon, to run consecutive to Count 3; Count 5 – sixty months to life in the NDOC, plus an equal and consecutive term of sixty months to life for the Use of a Deadly Weapon, to run consecutive to Count 4; Count 6 – twenty-four months to sixty months in the NDOC, to run consecutive to Count 5; Count 7 – one hundred twenty months to life in the NDOC, plus an equal and consecutive term of one hundred twenty months to life for the Use of a Deadly Weapon, to run Concurrent with Count 6; Count 8 – one hundred twenty months to life in the NDOC, plus an equal and consecutive term of one hundred twenty months to life for the Use of a Deadly Weapon, to run Consecutive to Count 7; Count 9 – one hundred twenty months to life in the NDOC, plus an equal and consecutive term of one hundred twenty months to life for the Use of a Deadly Weapon, to run Consecutive to Count 8; Count 10 – twenty-four months to sixty months in the NDOC, to run consecutive to Count 9; Count 11 – seventy-two months to one hundred eighty months in the NDOC, plus an equal and consecutive term of seventy-two months to one hundred eighty months for the Use of a Deadly Weapon, to run concurrent with Count 10; Count 12 – seventy-two months to one hundred eighty months in the NDOC, plus an equal and consecutive term of seventy-two

months to one hundred eighty months for the Use of a Deadly Weapon, to run consecutive to Count 11; Count 13 – twelve months in the Clark County Detention Center, to run concurrent with Count 12; and Count 14 – sixty-two months to one hundred fifty-six months in the NDOC, to run consecutive to Count 13. Petitioner received 1,251 days credit for time served. A special sentence of lifetime supervision was imposed to commence upon release from any term of imprisonment, probation or parole.

The Judgment of Conviction was filed September 24, 2008. Petitioner filed a Notice of Appeal on October 9, 2008. The Nevada Supreme Court affirmed Defendant's conviction on February 3, 2010. Remittitur issued on March 2, 2010.

Petitioner filed his pro per Petition for Writ of Habeas Corpus (Post-Conviction) on January 11, 2011. Through counsel, Petitioner filed a supplemental petition on August 26, 2011. After an evidentiary hearing, the district court denied the petition on October 22, 2012. The Findings of Fact, Conclusions of Law, and Order were filed on November 21, 2012. Petitioner filed a Notice of Appeal on February 12, 2013. The Nevada Supreme Court affirmed the denial of the writ on September 18, 2014. Remittitur issued on October 20, 2014.

Petitioner filed a pro per "Successive" Petition for Writ of Habeas Corpus on June 12, 2014. The district court denied this Successive Petition on December 2, 2014. Petitioner filed a Notice of Appeal on December 11, 2014. The Nevada Supreme Court affirmed the denial of the writ on September 11, 2015. Remittitur issued October 12, 2015.

On August 25, 2021, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) "Successive" "Newly Discovered Evidence" (hereinafter "8/25/21 Petition"), a Memorandum in Support of "Successive" Writ of Habeas Corpus Petition (Newly Discovered Evidence) (hereinafter "Memorandum"), and an Affidavit/Declaration requesting this Court refrain from appointing him counsel. On October 11, 2021, he filed a Request for Evidentiary Hearing (hereinafter "Request"). On December 3, 2021, he filed a Petition for Writ of Habeas Corpus (Post-Conviction) Second Amended Petition Successive Newly Discovered Evidence (hereinafter "12/2/21 Petition"). On December 23, 2021, Petitioner filed a Motion for

Extension of Time, asking for an additional 45 days so he may hire an attorney. These filings will be referred to collectively as the "Successive Petition." On January 7, 2022, the State filed its Response. On August 25, 2022, this Court heard argument on the Successive Petition. This Court denies the Successive Petition for the reasons stated as follows.

FACTUAL HISTORY

On the night of September 3, 2004, Dr. Eric Bernzweig ("Eric") and his fiancée, Julie Kim ("Julie"), were sleeping at their residence located at 7833 Lonesome Harbor, Las Vegas, Clark County, Nevada. At approximately 12:30 a.m. that night, an olive-skinned man rang the doorbell. The olive-skinned man told Eric that he was his neighbor and that his son had thrown his keys into Eric's backyard. The olive-skinned man asked if he could look for his keys in the backyard. Eric closed and locked the front door and in effort to help his alleged neighbor, went to the backyard, turned the lights on, and attempted to find the keys, to no avail. The olive-skinned man then asked Eric if he could go to the backyard and look for the keys with him, at which time Eric let him in and took him through his house to the backyard.

After not finding the keys in the backyard, the olive-skinned man told Eric he was going to go to his car to get a flashlight to aid in the search for the keys. Eric went to his garage to try to find a flashlight. Eric returned from the garage, to find the olive-skinned man in his house with two masked Black male individuals, both wielding guns with laser sights. DNA evidence eventually revealed Petitioner to be one of the masked intruders. The intruders tied Julie's hands with plastic ties. They tried to tie Eric up with the plastic ties but when the plastic ties did not fit, they handcuffed Eric instead, and took him to upstairs portion of the house.

The olive-skinned man demanded to know where Eric kept the safe. Eric told them that he did not have a safe. In an attempt to appease the intruders, Eric gave them approximately a thousand dollars in cash he had hidden in a closet. While the intruders were occupied, Eric was able to get out of his handcuffs. He attempted to get downstairs, but was caught by one of the masked intruders. While scuffling with one of the intruders, Eric was pistol-whipped two

or three times, which split his head open. Eventually, the intruders tied Eric up with electrical cords and left him to bleed on the floor.

While the olive-skinned man and the other masked intruder were looking for the safe with Eric, Petitioner was downstairs with Julie. Petitioner held her at gunpoint, put a pair of Eric's swim trunks over her head, put a cat toy in her mouth and threatened to kill her if she screamed. He then began to fondle her, placed his mouth on her breasts and sexually assaulted her by inserting his fingers into her vagina. He then forced Julie to spread her legs and sexually assaulted her by inserting his penis in her vagina. Petitioner then took Julie upstairs to the master bedroom, placed her face down on the bed and sexually assaulted her for a third time by inserting his penis in her vagina.

Shortly after Petitioner's last sexual assault, the intruders tied up Julie's legs and left the home. Julie worked her way loose and discovered Eric lying in a pool of blood. She untied him and they went downstairs to call the police.

Julie was taken to University Medical Center, where she underwent a sexual assault examination, which included the collection of buccal swabs, vaginal swabs, and breast swabs from the area of her breasts where the Petitioner put his mouth. Additionally, crime scene investigators collected, among other things, the top sheet and fitted sheet from the master bedroom.

Las Vegas Metropolitan Police Department ("LVMPD") forensic scientist David Welch was able to develop unknown male profile from the foreign DNA material detected on the breast swabs of the victim. Welch also tested one of the vaginal swabs but was unable to develop a profile from the vaginal swab. The DNA profile from the unknown male was searched against the local DNA Index System and no matches were found. The DNA profile was then uploaded to the National DNA Index System for comparison. Later, a CODIS match was discovered and came back to Petitioner, who was already in custody for another matter.

LVMPD Detective Michael Jefferies obtained a search warrant for a buccal swab from Petitioner, to confirm the DNA match was true and correct. In March 2005, LVMPD forensic

scientist Kathy M. Guenther ("Guenther"), using the unknown male profile created by Welch and the profile created from Petitioner's buccal swab, discovered a positive match or positive comparison with Petitioner's DNA on all 13 locations used by LVMPD forensic scientist to match DNA at the time. Under the statistical threshold set in the LVMPD laboratory, the chances of a random selective sample to have the same profile was six hundred billion (6,000,000,000) to one (1). Because six hundred billion is hundred times the earth's population at the time, under laboratory standards identity is assumed. In March of 2005, Petitioner was officially confirmed as the source of the foreign DNA material taken from Julie Kim body, at which time he was arrested.

In July of 2005, the LVMPD forensic lab added two additional markers for DNA matching, and now had 15 threshold points to match. Consequently, Guenther conducted further DNA testing from Julie's sexual assault examination. Guenther re-profiled the Petitioner known sample in order to compare his sample with the DNA testing of the rest of the sexual assault examination kit. The testing included extractions from the buccal swab and vaginal swabs from Julie, as well as the bed sheets removed from the bed in the master bedroom, and the bathrobe found in the master bedroom. Semen with sufficient spermatozoa was detected on one of the bedsheets (in two separate stains) and the vaginal swab. Once again, Petitioner was found to be a complete match with the DNA profiles created by the extractions from the soiled bedsheet and the vaginal swab.

ANALYSIS

I. THE PETITION IS PROCEDURALLY BARRED

The filings that constitute the Successive Petition are untimely, successive, and an abuse of the writ. Petitioner fails to demonstrate good cause or sufficient prejudice to permit him to evade the procedural bars. There are no facts which, if true, would entitle Petitioner to relief, so no evidentiary hearing is required.

A. The Petition is time-barred.

The Petition is 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.

"[T]he Legislature has determined that one year provides sufficient time within which to raise claims that trial and appellate counsel provided ineffective assistance." Rippo v. State, 134 Nev. 411, 421, 423 P.3d 1084, 1097, amended on denial of reh'g, 432 P.3d 167 (Nev. 2018). The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied because the "procedural default rules … are supposed to discourage the perpetual filing of habeas petitions." Rippo at 423, 423 P.3d at 1096.

The Nevada Supreme 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). 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 issued. 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 construed. In Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). In contrast with the short amount of time to file a notice of appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the postal system. Id. at 595, 53 P.3d at 903.

Remittitur from Petitioner's direct appeal issued on March 10, 2010. Petitioner had until March 10, 2011, to file a timely petition for writ of habeas corpus. This Petition was filed on August 25, 2021, more than eleven years after remittitur. Under NRS 34.726(1), this Petition is untimely. Absent a showing of good cause to excuse this delay, the petition must be denied.

B. The Petition Is Successive and an Abuse of the Writ

Second or successive petitions include those 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. The Successive Petition is an abuse of the writ.

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.

Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3). The burden of proving specific facts that show good cause for his failure to raise his claims earlier falls on the petitioner. NRS 34.810(3). Petitioner must also show actual prejudice. NRS 34.810(3).

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 v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

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, 497-98 (1991).

Petitioner has previously litigated two petitions for writ of habeas corpus. To the extent Petitioner raises new or different claims from those raised before, the Petition is an abuse of the writ. NRS 34.810(2). Petitioner himself recognizes his abuse of the writ, as the filings that comprise the instant Petition are actually and correctly titled "successive." The "newly-discovered" evidence cited in the Petition has been in Petitioner's possession since 2008. To raise these claims now is abusive, as his claims could have been raised in his appeal or in his first or second habeas petitions. NRS 34.810.

C. These Claims Are Waived

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 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)). NRS 34.810(1)(b)(2) states "The court shall dismiss a petition if the court determines that ... the petitioner's conviction was the result of a trial and the grounds for the petition could have been ... raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief."

Petitioner's claim in the 8/25/21 filing concerns a co-defendant who was arrested and charged after Petitioner. The co-defendant was identified in Petitioner's Presentence Investigation Report ("PSI"). See Motion to Amend Petition: NRS 34.724 Exhibit "A" Added Only, filed October 11, 2021, at 8. That page shows it was faxed on August 27, 2008.

Petitioner was clearly aware of the PSI prepared in 2008, as his attorney, in his presence, referred to the PSI during the sentencing hearing on August 28, 2008. See generally Reporter's Transcript of Sentencing, filed November 7, 2008. "I just wanted to point out there is an error on the PSI report, but my client would still like to go forward today with sentencing." Id. at 2. His attorney also acknowledged receiving a supplemental PSI that corrected Petitioner's

asserted error. Id. at 12. Petitioner's attorney affirmed to the Court that she provided both PSI reports to Petitioner. Id. at 13.

Rather than assert the confession of his co-defendant meant Petitioner could not also have been a participant, as he does here, Petitioner argued at sentencing that "The police framed me. I mean, either the police, somebody had to frame me. I was framed." Id. at 8. Petitioner's counsel, rather than arguing that her client could not have been the man who left his DNA on the victim, merely urged the Court to "not be persuaded by this one victim's experience." Id. at 11-12. As miserable as being raped at gunpoint while her fiancé was pistol-whipped and her home invaded must have been for the victim, Petitioner's attorney claimed "it certainly could have been worse." Id. Counsel did not, however, assert the co-defendant's very existence exonerated her client.

The existence of Mr. Chaziz is not newly discovered. His status as a co-defendant was brought to Petitioner's attention prior to sentencing. Any claim regarding this person could have been raised on direct appeal, or in either of Petitioner's previous habeas petitions. Since Petitioner did not raise any claims concerning his co-defendant on appeal, the issue is now waived, more than a decade later.

The claims in the 12/2/21 Petition are also waived. In that filing, Petitioner raises substantive claims of Fourth and Fifth Amendment violations. Because the facts related to these claims were available to Petitioner at the time of his direct appeal in 2008, the claims are waived now. On appeal, Petitioner asserted the State consumed all available DNA material. The Nevada Supreme Court held this claim was belied by the record. See Order of Affirmance, Docket No. 52573, filed February 3, 3010, at 1. Petitioner claimed the trial court's denial of his motion to preclude improper use of DNA evidence prejudiced him, but the Supreme Court held that no improper DNA evidence or argument was presented to the jury. Id. at 2. Petitioner did not claim, as he does here, that his due process rights were violated because his attorney was not present when a cotton swab collected DNA from inside his cheek. Because Petitioner

knew his attorney was not present for DNA collection at the time of the collection, this claim is waived for failure to raise it on direct appeal.

D. Application of the procedural bars is mandatory.

The Nevada Supreme Court has held that courts have 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. Ignoring these procedural bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. 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.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003).

II. THE PETITION FAILS TO DEMONSTRATE GOOD CAUSE OR ACTUAL PREJUDICE

To avoid procedural default, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "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) (emphasis added). Petitioner has failed to demonstrate good cause or actual prejudice.

A. Petitioner fails to show good cause for filing outside the statutory timeframe

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the

lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

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).

The factual basis for Petitioner's claims was available at the time he defaulted. Petitioner has shown no good cause for failing to present his habeas claims earlier. He cites no impediment external to the defense that prevented him from complying with the procedural rules. He offers no cogent explanation for his years-long delay. The only attempt Petitioner makes to explain the delay in filing is that he has "newly discovered evidence." 8/25/21 Petition at 4; Memorandum at 1.

Petitioner asserts he only discovered the existence of Ahud Chaziz when he recently read his PSI after having it in his prison cell since 2008: "After serving 16 year in the Nevada Department of Corrections (NDOC), Petitioner was reviewing the PSI report that was prepared by Parole and Probation." Memorandum at 3. He "expresses his actual innocence with newly discovered evidence of a [so-called co-defendant] he just recently learned about by reading a 'PSI' report done by Parole and Probation, after Petitioner was found guilty, not during his trial proceedings." Id. at 8.

The record shows Petitioner knew of Mr. Chaziz much earlier than December 2021, so Mr. Chaziz is not newly discovered evidence. Petitioner's PSI was completed on August 18, 2008. Id. The PSI identified Ahud Chaziz as co-defendant. Id. Counsel discussed the PSI with Petitioner before sentencing on September 9, 2008. See Reporter's Transcript of Evidentiary Hearing, filed November 13, 2012, at 68-69. Petitioner discussed Mr. Chaziz at the evidentiary hearing. Id. at 151.

A document in Petitioner's possession for thirteen years cannot serve as "newly discovered" evidence. A person that Petitioner wanted to subpoena in 2008 cannot serve as "newly discovered" evidence. Because Mr. Chaziz is not newly discovered evidence, he cannot serve as good cause for Petitioner failing to raise his claims earlier.

B. Petitioner fails to present a valid claim of actual innocence

Petitioner alleges he has presented a claim of actual innocence, based upon newly discovered evidence, due to his review of his Presentence Investigation Report that was prepared in 2008. 8/25/21 Petition, at 8. When a petitioner cannot demonstrate good cause, the court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To demonstrate prejudice, a defendant must show "not merely that the errors of [the proceeding] 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. at 960, 860 P.2d at 716 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

"The conviction of a petitioner who was actually innocent would be a fundamental miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive petition." Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006). However, "actual innocence means factual innocence, not mere legal insufficiency." Mitchell, 122 Nev. at 1273–74, 149 P.3d at 36 (quoting Bousley v. United States, 523 U.S. 614, 623-24, 118 S.Ct. 1604 (1998)). A fundamental miscarriage of justice requires "a colorable showing" that the

petitioner is "actually innocent of the crime." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. This requires that the petitioner present *new* evidence of his innocence. See, e.g., House v. Bell, 547 U.S. 518, 537, 126 S.Ct. 2064, 2077 (2006) ("a gateway claim requires 'new reliable evidence—whether it is exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" (quoting Schlup v. Delo, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995)). "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." Schlup, 513 U.S. at 316, 115 S.Ct. at 861.

Petitioner cannot show that any alleged errors during the underlying proceedings disadvantaged him by their constitutional dimensions. He fails to identify new evidence of his innocence, nor does he show a constitutional violation resulted in a fundamental miscarriage of justice that worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.

1. Ahud Chaziz' guilty plea

Petitioner says Ahud Chaziz pled guilty on March 16, 2009, to the crimes for which Petitioner was convicted. Memorandum at 1. He claims a constitutional right to all material in the Chaziz case in addition to his own. Id. at 5. He asserts a right to have introduced Chaziz at trial since the victims identified Chaziz as the unmasked assailant but did not identify Petitioner as one of the masked assailants. Id. at 6. He asserts a Brady violation because the State did not turn over Chaziz' guilty plea, made six months after Petitioner's trial. Id. Petitioner feels that if the jury had known one of several assailants would confess six months in the future, the jury would not have convicted Petitioner of being another of the assailants. Id.

The facts presented at trial and in the charging information show three men conspired to commit the crimes. See Information filed July 11, 2005. Petitioner wholly fails to demonstrate that the guilt of Mr. Chaziz as one of the three men in any way demonstrates

Petitioner's innocence of being another of the men. He also fails to demonstrate the State committed any constitutional violation regarding Mr. Chaziz's existence, as his existence was known to Petitioner and was not exculpatory. DNA evidence from Petitioner, not from Mr. Chaziz, was found on the victim's vagina, on her breasts, and on her bedsheets. Therefore, Petitioner cannot show prejudice.

2. Joinder and severance

Petitioner requested joinder at his 2012 evidentiary hearing, arguing Mr. Chaziza's case should have been joined with his own so that Mr. Chaziza could have been compelled to testify in Petitioner's favor.[1] See Reporter's Transcript of Evidentiary Hearing, filed November 13, 2012, at 151.

> I know for a fact this is a problem that I'm having also with the, this guy Chaziza, he could have cleared me. If me and him have the same case, if me and him, if I was supposed to be with him and we supposed to be the guys who knocked on the door, why wasn't we convicted together? Why wasn't we together? Because I told my lawyer, I said hey, go and investigate him because he can clear me. Once he [Mr. Chaziza] say that it wasn't me, then it's gonna put a real big discrepancy in anything. But nobody chose to do nothing about it.

Id.

The expectation that Mr. Chaziza could have been compelled to testify in Petitioner's favor six months before he pled guilty himself ignores Mr. Chaziza's right to avoid self-incrimination. Nonetheless, the fact Petitioner claimed his attorneys were ineffective for failing to interview Mr. Chaziza indicates Petitioner knew of his existence. The State pointed out that when Mr. Chaziza pled guilty after Petitioner's trial, he admitted to committing the crimes with Petitioner, and that Mr. Chaziza was never accused of being the rapist. Id. at 154. The Court held that "it's of no consequence to this Court either that defendant was concerned or wanted to know why the co-defendant wasn't interviewed." Id. at 165.

[1] The spelling of the co-defendant's name differs from document to document.

Petitioner laments the State never filed a severance to separate the trials of Petitioner and Mr. Chaziza. See generally Memorandum. Petitioner complains the State failed to join Petitioner and his co-defendant at trial, as Petitioner has a constitutional Fourteenth Amendment right to severance. Memorandum at 2. Petitioner feels the State "hid" Mr. Chaziz by assigning him a different case number. Id. at 11-12. As an initial matter, Mr. Chaziza never went to trial. Secondly, the defense must file a severance if it wants defendants tried separately, not the State. Finally, the two defendants were not indicted together so there was never an opportunity nor a necessity to sever their trials.

Petitioner's claim that his "right" to severance was compromised because the two defendants were not joined makes little sense. Petitioner asks, "Why didn't state's prosecutor hand over a severance to the Petitioner's defense counsel when they had Ahud Chaziz in custody for one and a half years?" Id. at 5. He asserts the State should have filed a "joinder of severance and/or NRS 174.165 Relief from Prejudicial Joinder." Id. at 4. He says "it do appear that Petitioner was prejudiced by the State not joinding [sic] nor filing severance in either court to establish probable cause to suspect that a crime has been committed and that the Petitioner committed it." Id.

Petitioner also asserts severance was required where the State charges the crime of felon in possession of a firearm. Id. He claims that since he "was charge with a firearm," the State violated his rights by hiding Chaziz, as NRS 174.165 thus entitled Petitioner to severance. Id. He alleges the State should have produced Mr. Chaziz "with a severance." Id. at 8. Petitioner was not charged as a felon in possession of a weapon.

NRS 174.165 discusses severance, not mandatory joinder. Petitioner cites no authority showing two defendants who commit a crime together must be tried together. This is fatal to his claim that he had a right to be tried with Mr. Chaziz. 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).

Because Petitioner does not show he was entitled to have his trial joined with that of Mr. Chaziz, if Mr. Chaziz had had a trial, he cannot show prejudice sufficient to evade the procedural bars. Petitioner's demand for joinder so he could receive severance does not clarify matters.

3. DNA testing

Petitioner again asserts he was not permitted to test the DNA evidence against him. Memorandum at 3, 7. See also 12/3/21 Petition at 9, 13. He wanted to test the DNA from the victim to show it matched Mr. Chaziz's DNA, not the skin cells taken from Petitioner's mouth via buccal swab. Id. at 7. Petitioner fails to explain how the State's having Mr. Chaziz in custody increases the likelihood that the DNA match implicated Mr. Chaziz. He claims that since Mr. Chaziz was in State's custody at some point, Petitioner should not have to meet the burden to show this "newly discovered evidence probably would have resulted in acquittal." Id. Petitioner feels the State "fabricated DNA and intentionally used all of it so Petitioner could not independently test, which is a violation of constitutionality." Id. at 8.

This issue has been adjudicated by the Nevada Supreme Court and is now the law of the case. See Order of Affirmance, Docket No. 52573, filed February 3, 2010, at 1 ("Because Henderson's claim that the State did not preserve DNA material from each sample for defense retesting is belied by the record, we conclude that the district court did not abuse its discretion."); Order of Affirmance, Docket No. 62629, filed September 18, 2014, at 2 ("Thus,

appellant's claim that trial counsel failed to obtain a [DNA] expert is belied by the record. Further, trial counsel testified that, based on the DNA expert's advice and determination that the testing procedures were done correctly and that appellant was the source of the three separate DNA samples, trial counsel decided not to retest the DNA.").

Because these claims have been addressed on their merits, they cannot provide sufficient prejudice to evade the procedural bars.

4. Miscellaneous Claims

Petitioner cites Nevada Rules of Professional Conduct 1.18(2) (screening of potential clients for conflicts) to assert that his attorneys avoided learning about Mr. Chaziz. Memorandum at 9-10. He claims his attorneys violated Rule 3.4(a) (withholding evidence) by failing to sever the two defendants. Id. at 10. The District Attorney's Office is also accused of violating a handful of Nevada Rules of Professional Conduct, including Rules 1.3 (diligence), 3.3 (candor toward tribunal), 3.8 (responsibilities of prosecutors), 8.3 (reporting professional misconduct), NRS 47.240 (conclusive presumptions), NRS 48.015 (relevant evidence), and NRS 48.035 (excluding relevant evidence). Id. at 12-13.

In his other new habeas filing, Petitioner asserts his Miranda rights were violated when the State swabbed his mouth pursuant to a subpoena without the presence of his attorney. 12/3/21 Petition at 8. He claims his conviction is "void" because the court lost jurisdiction over him when his counsel was not present. Id. at 9, 10. He reads Miranda v. Arizona to assert that he cannot face trial against DNA taken without an attorney. Id. at 10. Petitioner requests relief from the "shameful-crafty intentional injustice" committed by the prosecutor, court, and defense attorney. Id. at 11. Because "Petitioner was a convicted felon in the state of Nevada," he feels the State violated NRS 176.09123(3) by taking a DNA sample. Id. This claim ignores NRS 176.09123(5) which allows a court to order a specimen. Furthermore, a cheek swab is not an interrogation under Miranda.

Because these claims could have been raised on direct appeal, they are now waived.

III. The Successive Petition is Barred by the Doctrine of Laches

The instant Successive Petition is also barred by the doctrine of equitable laches. Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000). Under NRS 34.800,

> 1. A petition may be dismissed if delay in the filing of the petition:
>
> (a) Prejudices the respondent or the State of Nevada in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred; or
>
> (b) Prejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence.
>
> 2. A period exceeding 5 years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the State. In a motion to dismiss the petition based on that prejudice, the respondent or the State of Nevada must specifically plead laches. The petitioner must be given an opportunity to respond to the allegations in the pleading before a ruling on the motion is made.

The Nevada Supreme Court has held that in applying the doctrine of laches to an individual case, several factors should be considered, including, "(1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State." Hart, 116 Nev. at 563-64, 1 P.3d at 972.

Petitioner was found guilty in 2008, thirteen years ago. The facts supporting his claims were known to him at the time of his direct appeal in 2008. The failure to raise the claims earlier shows a knowing acquiescence to existing conditions. The delay between the judgment of conviction on September 24, 2008 and the filing of the instant petitions is inexcusable. Petitioner fails to provide any legitimate excuse for waiting to file this particular petition.

If the Court granted the Successive Petition, the State would suffer substantial prejudice. The State would face extreme difficulty in locating witnesses to these crimes thirteen years after they occurred. Even if the State were able to locate its witnesses again, it is certain their recollections would be much less clear now than they were at trial in 2008. The State may also not be able to re-gather evidence that may have been lost or destroyed because of the lengthy passage of time. Therefore, the State would suffer significant prejudice if Petitioner were allowed to overturn his conviction and head back to trial. As such, this Petition is barred by the doctrine of equitable laches.

IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Petitioner requests an evidentiary hearing to resolve his Petition. There is no need for an evidentiary hearing because the Successive Petition can be summarily dismissed as procedurally barred.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, no evidentiary hearing is necessary. NRS 34.770; Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The District Court considered itself the 'equivalent of. . .the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing."). NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:

1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Here, there is no need for an evidentiary hearing because the Petition can be summarily dismissed as time-barred. Petitioner has failed to plead specific facts that could establish good cause and prejudice to overcome the procedural bars. There is no need to expand the record to establish this Petition was filed outside the statutorily-required timeframe. Further, a hearing is not required to show Petitioner could have learned of Mr. Chaziz in 2008 by reading the documents in his possession.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and it is, hereby denied.

DATED this _____ day of October, 2022.

Dated this 21st day of October, 2022

Bita Yeager

DISTRICT JUDGE

CFA 4B8 603B B8C1
Bita Yeager
District Court Judge

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

BY Karen Mishler
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730

km/appellate

October 21, 2022

UNITED STATES OF AMERICA
DISTRICT COURT
OF THE
EIGHTH
JUDICIAL
DISTRICT
COUNTY OF CLARK
STATE OF NEVADA

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DISTRICT COURT
CLARK COUNTY, NEVADA

Joseph Henderson, Plaintiff(s) vs. Warden William Guttere, Defendant(s)	CASE NO: A-21-840121-W DEPT. NO. Department 1

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.