

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Electronically Filed
Nov 15 2022 02:02 PM
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-21-840121-W
Related Case 05C212968
Docket No: 85367

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
JOSEPH HENDERSON #67224,
PROPER PERSON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-21-840121-W Joseph Henderson, Plaintiff(s) vs. Warden William Guttere,
Defendant(s)

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A-21-840121-W

Case No.
Dept. No

Dept. 2

FILED

AUG 25 2021

CLERK OF COURT

IN THE JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF.....

JOSEPH A. HENDERSON
Petitioner,

v.

WARDEN
WILLIAM GUTTERE
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

"SUCCESSIVE"
"NEWLY DISCOVERED EVIDENCE"

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.
- (7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON
2. Name and location of court which entered the judgment of conviction under attack: CLARK CO., NEVADA
3. Date of judgment of conviction: 8-16-08
4. Case number: C 212968
5. (a) Length of sentence: MULTIPLE LIVES IN PRISON

CLERK OF THE COURT

AUG 19 2021

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(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes No ☒

If "yes," list crime, case number and sentence being served at this time:

7. Nature of offense involved in conviction being challenged: ROBBERY, SEXUAL ASSAULT, KIDNAPING
ETC

8. What was your plea? (check one)

(a) Not guilty ☒

(b) Guilty

(c) Guilty but mentally ill

(d) Nolo contendere

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details:

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury ☒

(b) Judge without a jury

11. Did you testify at the trial? Yes No ☒

12. Did you appeal from the judgment of conviction? Yes ☒ No

13. If you did appeal, answer the following:

(a) Name of court: EIGHT DISTRICT / NEVADA SUPREME COURT

(b) Case number or citation: C.212968

(c) Result: denied

(d) Date of result: 11-4-09

(Attach copy of order or decision, if available.)

1 14. If you did not appeal, explain briefly why you did not:
2
3

4 15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any
5 petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ☒ No
6

7 16. If your answer to No. 15 was "yes," give the following information:

8 (a) (1) Name of court: NEVADA SUPREME COURT

9 (2) Nature of proceeding: Appeal denied

10 (3) Grounds raised: DUE PROCESS VIOLATIONS (3)
11
12

13 (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☒ No
14

15 (5) Result: Denied

16 (6) Date of result: 8-10-10

17 (7) If known, citations of any written opinion or date of orders entered pursuant to such result:
18 don't have discovery

19 (b) As to any second petition, application or motion, give the same information:

20 (1) Name of court: 8th DISTRICT

21 (2) Nature of proceeding: denied

22 (3) Grounds raised: DUE PROCESS VIOLATIONS

23 (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes No ☒
24

25 (5) Result: denied

26 (6) Date of result: 2-6-11

27 (7) If known, citations of any written opinion or date of orders entered pursuant to such result:
28 don't have any discovery

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ☒ No ☐

Citation or date of decision: 6-8-11

(2) Second petition, application or motion? Yes ☒ No ☐

Citation or date of decision: 7-4-12

(3) Third or subsequent petitions, applications or motions? Yes ☒ No ☐

Citation or date of decision: 9-14-16

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: NO

(b) The proceedings in which these grounds were raised: NO

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

NEWLY discovered EVIDENCE SEE ATTACHED MEMORANDUM SUCCESSIVE

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

1
2 19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing
3 of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in
4 response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the
5 petition. Your response may not exceed five handwritten or typewritten pages in length.) yes
6

7 20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment
8 under attack? Yes No ☒

9 If yes, state what court and the case number:
10

11 21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on
12 direct appeal: VILATE RACLOSTA, BISSETTE, PATRICEA KICE, JASON CARR ETC.
13

14 22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under
15 attack? Yes No ☒

16 If yes, specify where and when it is to be served, if you know:
17

18 23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the
19 facts supporting each ground. If necessary you may attach pages stating additional grounds and facts
20 supporting same.
21
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(a) Ground ONE: SEE - MEMORANDUM IN SUPPORT OF "SUCCESSIVE"
WRIT OF HABEAS CORPUS PETITION
[NEWLY DISCOVERED EVIDENCE]

Supporting FACTS (Tell your story briefly without citing cases or law.):

1 (b) Ground TWO:
2
3
4
5 Supporting FACTS (Tell your story briefly without citing cases or law.):
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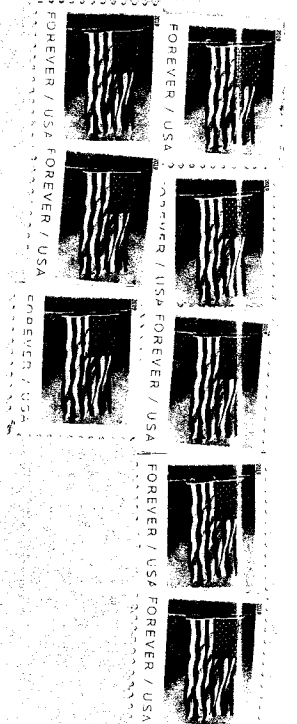
1 (c) Ground THREE:

5 Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground FOUR:

Supporting FACTS (Tell your story briefly without citing cases or law.):

Mr. Henderson T. Jones No. 1301
P.O. Box 1089
Elk Mountain
ID 89301



8th Judicial District Court
Clerk of the Court.
200 Lewis Ave
Las Vegas NV. 7.
89101

11
Legal Mail
Legal Mail

ELY STATE PRISON
AUG 11 2021

FILED
AUG 25 2021

John L. Blum
CLERK OF COURT

IN THE SIGHT JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

Joseph A Henderson

Petitioner/Plaintiff,

v.

William Britter

Respondent/Defendant.

Case No. A-21-840121-W

Dept. No. Dept. 2

Docket No. _____

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Respondent/Defendant, STATE OF NEVADA

CLARK, County District Attorney, and OFFICE

_____, Esq.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on the _____ day of _____
_____, 20 __, at the hour of 9:00 O'clock A.M., or as soon thereafter as
the parties may be heard, the undersigned will bring on for hearing the attached **MOTION FOR
WITHDRAWAL OF ATTORNEY OF RECORD**, before the above-entitled Court, at the
_____, Courthouse, in _____, Nevada, in
Department No. _____, thereof.

DATED this 4th day of JULY, 20 21.

Respectfully submitted,

Joseph Henderson 7-4-21
Petitioner/Plaintiff
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

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AUG 19 2021
CLERK OF THE COURT

CERTIFICATE OF SERVICE BY MAIL

I, Joseph Henderson, hereby certify pursuant to Rule 5(b) of the NRCP, that on this 4 day of JULY, 20021, I served a true and correct copy of the above-entitled _____ postage prepaid and addressed as follows:

EIGHT DISTRICT COURT,
200 Lewis AVE
W NV 89101

DISTRICT ATTORNEY OFFICE
200 Lewis AVE
W NV
89101

Signature

Joseph Henderson

Print Name

Joseph Henderson

Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding HABEAS CORPUS

SUCCESSIVE PETITION "NEWLY DISCOVERED EVIDENCE"
(Title of Document)

filed in District Court Case No. C212968

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

Joseph Fender
(State specific law)

-OR-

B. For the administration of a public program or
for an application for a federal or state grant.

Joseph Fendersen
(Signature)

7-4-21
(Date)

1 JOSEPH HENDERSON #67224

2 POST OFFICE BOX 1989

3 ELY STATE PRISON (ESP)

4 ELY, NEVADA 89301-1989

5 PETITIONER IN PRO-SE...

FILED

AUG 25 2021

7 DISTRICT COURT

CLERK OF COURT

8 CLARK COUNTY, NEVADA

10 JOSEPH HENDERSON,

11 PETITIONER,

CASE NO.

A-21-840121-W
Dept. 2

12 VS

DEPT NO.

13 WARDEN; WILLIAM GETTERE,

DATE OF HEARING:

14 RESPONDANT,

TIME OF HEARING:

16 MEMORANDUM IN SUPPORT OF

17 "SUCCESSIVE" WRIT OF HABEAS CORPUS PETITION

18 [NEWLY DISCOVERED EVIDENCE]

19 COMES NOW, JOSEPH HENDERSON, PETITIONER, IN THIS ENTITLED

20 SUCCESSIVE WRIT OF HABEAS CORPUS ON NEWLY DISCOVERED EVIDENCE

21 MATTERS INVOLVING; A "CO-DEFENDANT BY THE NAME OF AHUD YUDJA

22 CHAZIZ BARRING THE CASE NO. C 229335 DEPT. 21; THIS ALLEGED CO-

23 DEFENDANT TOOK A DEAL MARCH 16, 2009, "NO SEVERENCE EVER FILED":

24 RESPECTFULLY SUBMITTED

25 BY: Joseph Henderson

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

JOSEPH HENDERSON,

PETITIONER,

CASE NO.

VS.

DEPT NO.

THE STATE OF NEVADA,
WARDEN; WILLIAM GOTTERE

RESPONDANT,

I. ISSUES PRESENTED

1. THE STATE OF NEVADA PROSECUTOR COMMITTED MISCONDUCT AND WAS EVASIVE BY HIDING AWAY THE PERSON WHO PLEAD GUILTY AND ADMITTED TO THE SERIOUS CHARGES PETITIONER WAS ACCUSED OF; FURTHERMORE WITHHELD ALL EVIDENCE FAVORABLE TO PETITIONER THAT WOULD HAVE RELIEVED HIM OF ALL CRIMINAL CHARGES, BEVERENCE ISSUE;

2. INEFFECTIVE ASSISTANCE OF COUNSEL CAME ON ALL LEVELS OF PETITIONERS FIGHT FOR RELIEF, WHEN EACH OF THEM FAILED IN THEIR OBLIGATION TO FULFILL THEIR DUTIES ACCORDING TO ABA RULES OF CONDUCT, INVESTIGATIONS,

II. STATEMENT OF THE CASE

PETITIONER HAS NEVER HEARD NOR SEEN THIS SO CALLED CO DEFENDANT ANKID YUDJA CHAZIZ; STATES PROSECUTOR FAILED TO FOLLOW CHAPTER 174 AND DID IN FACT DEPRIVE PETITIONER OF HIS FOURTEENTH AMENDMENT RIGHT.

POINTS AND AUTHORITIES

BRIEF HISTORY:

ON JUNE 10, 2005, PETITIONER APPEARED BEFORE THE JUSTICE COURT AND PLEAD "NOT GUILTY" TO THE 14 COUNT CRIMINAL COMPLAINT, 15 DAYS LATER PRELIMINARY HEARING WAS HELD, AND PROBABLE CAUSE WAS ESTABLISHED BY DNA EVIDENCE PETITIONER WAS NOT ALLOWED TO TEST.

ON JUNE 4, 2008, PETITIONER PROCEEDED TO TRIAL ON ALL 14 CHARGES; THE JURY FOUND PETITIONER GUILTY ON ALL COUNTS WITHIN THE CRIMINAL COMPLAINT, A "PSI" REPORT WAS DONE AUGUST 18, 2008, BY PAROLE/PROBATION.

ON SEPTEMBER 9, 2008, THE PETITIONER WAS SENTENCE TO MULTIPLE LIFE SENTENCES TO THE NEVADA DEPARTMENT OF CORRECTIONS (NDOC).

IN EACH AND EVERY STAGE OF APPEALS, STATE COURTS/FEDERAL COURTS; EVERY LAST ATTORNEY APPOINTED TO REPRESENT PETITIONER FAILED IN THEIR OBLIGATIONS TO EFFECTUALLY REPRESENT THE PETITIONER ACCORDING TO: ABA RULES ON PROFESSIONAL CONDUCT AND NEVADA SUPREME COURT RULES OF PROFESSIONAL CONDUCT BY COUNSEL.

PROCEDURAL VIOLATION BY

STATE PROSECUTOR AND DEFENSE COUNSEL

AFTER SERVING 16 YEAR IN THE NEVADA DEPARTMENT OF CORRECTIONS (NDOC) PETITIONER WAS REVIEWING THE "PSI REPORT" THAT WAS PREPARED BY PAROLE AND PROBATION, IT WAS FURTHER DISCOVERED THAT AHMED CHAZIZ WAS MENTIONED ON PAGE "8" AS A CO-DEFENDANT MARCH 16, 2009.

1 THIS CODEFENDANT AHUD CHAZIZ WAS IN THE CUSTODY OF THE SHERIFF DEPART -
2 MENT METRO (CCDC) FOR ONE AND A HALF 1½ YEARS BEFORE PETITIONER WAS
3 ARRESTED, THIS WAS PLENTY OF TIME - FOR THE STATE TO FILE A JOINDER OF
4 SEVERENCE AND OR: NRS 174.165 RELIEF FROM PREJUDICIAL JOINDER.

5 1. IF IT APPEARS THAT A DEFENDANT OR THE STATE OF NEVADA IS
6 PREJUDICED BY A JOINDER OF OFFENSES OR OF DEFENDANTS IN
7 AN INDICTMENT OR INFORMATION, OR BY SUCH JOINDER FOR
8 TRIAL TOGETHER, THE COURT MAY ORDER AN ELECTION OR SEPA -
9 RATE TRIALS OF COUNTS, GRANT A SEVERANCE OF DEFENDANTS
10 OR PROVIDE WHATEVER OTHER RELIEF JUSTICE REQUIRES.

11
12 PETITIONER STATES THE VIOLATION OF THE ABOVE, AND IT DO APPEAR THAT PETITIONER
13 WAS PREJUDICED BY THE STATE NOT JOINING NOR FILING SEVERANCE IN EITHER
14 COURT TO ESTABLISH PROBABLE CAUSE TO SUSPECT THAT A CRIME HAS BEEN
15 COMMITTED AND THAT THE PETITIONER COMMITTED IT.

16 SEVERANCE MUST BE REQUIRED TO ENSURE FAIRNESS IN FUTURE CASES
17 WHERE THE STATE SEEKS CONVICTIONS ON MULTIPLE COUNTS, INCLUDING A COUNT
18 OF POSSESSION OF A FIREARM BY AN EXFELON UNDER NRS 202.365. SEVERANCE
19 OF THE EX-FELON IN POSSESSION OF A WEAPON WILL BE REQUIRED, BROWN V.
20 STATE, 114 NEV. 1118, 967 P.2d 1126, 114 NEV. ADV. REP. 121, 1998. NEV LEXIS 130,
21 (NEV. 1998).

22 PREJUDICE EFFECT

23 PETITIONER WAS CHARGE WITH A FIREARM BUT WAS DENIED THE FAIRNESS
24 OF NRS 174.165 WHEN THE STATE OF NEVADA, PROSECUTOR'S OFFICE 110-AWAY
25 CASE NO. C229335 AHUD CHAZIZ. WHO PLEAD GUILTY ON ALL COUNTS THAT THE

1 PROSECUTOR REVEALED BRADY VIOLATION:

2 THE THIRD CIRCUIT IN THE BALDI CASE CONTRUED THAT STATEMENT IN PYLE V. KANAS TO
3 MEAN THAT THE "SUPPRESSION OF EVIDENCE FAVORABLE" TO THE ACCUSED WAS ITSELF SUFF-
4 FICIENT TO AMOUNT TO A DENIAL OF DUE PROCESS. 195 F.2d AT 820. IN NAPUE V. TILL-
5 MOIS, 360 US 264, 269, 3 L ed 2d 1217, 1221, 79 S. CT 1173. WE EXTENDED THE TEST FOR-
6 VIOLATED IN MIDGNEY V. HOLLOMAN WHEN WE SAID: "THE SAME RESULT OBTAINS WHEN
7 THE STATE, ALTHOUGH NOT SOLICITING FALSE EVIDENCE, ALLOWS IT TO GO UNCOR-
8 RECTED WHEN IT APPEARS." AND SEE ALCORTA V. TEXAS, 355 US 28, 2 L ed 2d 9,
9 78 S. CT 103; WILDE V. WYOMING, 362 US 607, 4 L ed 2d 985, 80 S. CT 900. CF.

10 DURLY V. MAYO, 351 US 277, 285, 100 L ed 1178, 1185, 76 S. CT 806 (DISSENTING OPINION),
11 REASONABLE DOUBT; THE PROSECUTOR HAD A MORAL OBLIGATION PURSUANT TO
12 THE NEVADA REVISED STATUTE AND THE FOURTEENTH AMENDMENT TO THE US CONSTITUTION
13 TO ACT ACCORDINGLY TO THE RULES OF THE NEVADA SUPREME COURT AND THE ABA RULES
14 OF PROFESSIONAL CONDUCT. [WHY] DID THE STATES PROSECUTOR HIDE AWAY THIS SO-CALLED
15 CO-DEFENDANT WHEN THERE WAS SUFFICIENCY OF EVIDENCE THAT WOULD HAVE RELIEVED
16 PETITIONER OF ALL CHARGES? [WHY] DIDN'T STATES PROSECUTOR HAND OVER A SEVERANCE
17 TO THE PETITIONERS DEFENSE COUNSEL WHEN THEY HAD ALAN CHAZIZ IN CUSTODY FOR ONE
18 AND A HALF YEARS?

19 PREJUDICE EFFECT; PETITIONER HAD A CONSTITUTIONAL RIGHT TO ALL MATERIAL
20 IN ALAN CHAZIZ CASE TO SUPPORT HIS INNOCENCE HE HAVE MAINTAINED TO THIS DAY,
21 IT PREJUDICE THE PETITIONER BECAUSE STATES PROSECUTOR HAD INFORMATION ABOUT THE
22 GUILT ALAN CHAZIZ PLEAD GUILTY TO, THAT PETITIONER HAD A RIGHT TO INTRODUCE TO
23 HIS JURY DURING TRIAL; IT IS ALSO KNOWN THAT ALAN CHAZIZ WAS IDENTIFIED BY
24 BOTH VICTIMS WHO COMMITTED THESE CRIMES; NOT PETITIONER WHO VIOLATED THE
25 14TH AMENDMENT OF U.S. CONSTITUTION.

1 IN WEARRY V. WARDEN, 577 U.S. 385, 136 S.Ct. 1002, 194 L.Ed.2d 78, 2016
2 "PROSECUTION'S FAILURE TO DISCLOSE MATERIAL EVIDENCE VIOLATED DUE PROCESS RIGHTS
3 BECAUSE NEWLY REVEALED EVIDENCE SUFFICED TO UNDERMINE CONFIDENCE IN
4 MINUTES' CONVICTION BECAUSE WITNESSES CREDIBILITY, ALREADY DIMINISHED BY
5 MANY INCONSISTENT STORIES, WOULD HAVE BEEN FURTHER DIMINISHED HAD THE
6 JURY LEARNED ABOUT NEWLY REVEALED EVIDENCE." AGAIN BRIDY MATERIAL
7 TO SUPPORT DISCLOSURE SEE: UNITED STATES V. AGURS, 427 US 97, 49 L.Ed 2d 342, 96
8 S. CT 2392 (1976). FAILURE TO DISCLOSE.

9 EVIDENCE THAT IS SUFFICIENT TO EITHER THE STATE OR DEFENSE SHOULD AND
10 MUST BE TURNED OVER TO THE OTHER PARTY TO SECURE FAIRNESS, EITHER IT CONCERNS
11 GUILT OR NOT GUILTY OF ALLEGE CHARGES PURSUANT TO NAS 174/165, SEVERANCE:
12 THE SO CALLED CO-DEFENDANT AHMAD Y. CHAZIZ GAVE A CONFESSION TO
13 THE COURT, "ADMITTING THE ACTUAL CRIMES, THIS CONFESSION HAD BEEN SUP-
14 PRESSED BY THE PROSECUTION NOTWITHSTANDING A REQUEST BY THE PETITIONER
15 COUNSEL TO ALLOW HIM TO EXAMINE THE ACCOMPLICES' EXTRAJUDICIAL
16 STATEMENT." BRADY V. MARYLAND, 10 LED 2D 215, 373 US 83.

17
18 IF THE JURY WOULD HAVE KNOWN
19 THE CONFESSION OF AHMAD CHAZIZ, REASONABLE DOUBT WOULD HAVE
20 STOPPED A GUILTY VERDICT, BECAUSE NO OTHER EVIDENCE EXISTED
21 AGAINST YOUR PETITIONER AND, PETITIONER WOULD NOT HAVE BEEN FOUND
22 GUILTY; HERE I REITERATE, BIGLIO V. UNITED STATES, 31 LED 2D 104,
23 406 US 150." PETITIONER FILED A MOTION FOR A NEW TRIAL ON THE
24 BASIS OF NEWLY DISCOVERED EVIDENCE CONTENDING THAT THE GOVER-
25 NMENT FAILED TO DISCLOSE AN ALLEGED PROMISE OF LENIENCY

1 MADE TO ITS KEY WITNESS IN RETURN FOR HIS TESTIMONY. AT A
2 HEARING ON THIS MOTION, THE ASSISTANT UNITED STATES
3 ATTORNEY WHO PRESENTED THE CASE TO THE GRAND JURY ADMITTED
4 THAT HE PROMISED THE WITNESS THAT HE WOULD NOT BE PRO-
5 SECUTED IF HE TESTIFIED BEFORE THE GRAND JURY AND AT TRIAL.
6 THE ASSISTANT WHO TRIED THE CASE WAS UNAWARE OF THE PRO-
7 MISE.
8

9 EVIDENCE WAS MATERIAL FROM AHMAD CHAZIT'S CASE; THERE IS A
10 REASONABLE PROBABILITY THAT, HAD THE EVIDENCE BEEN AVAILABLE
11 TO THE DEFENDANT, THE RESULTS OF THE PROCEEDINGS WOULD HAVE
12 BEEN DIFFERENT; 'REASONABLE DOUBT AGAIN' WAS THAT THE STATE FAILED
13 TO PRESERVE EVIDENCE IN LIGHT OF THE DEFENDANT TO PROVE THAT DNA
14 EVIDENCE BELONG TO AHMAD CHAZIT, NOT THE DEFENDANT. WE MUST
15 REMEMBER THERE WAS [NO] OTHER EVIDENCE TO LINK PETITIONER TO
16 THIS ENTIRE CASE: DANTALS V. THE STATE OF NEVADA, 114, NEV. 261, 956 P.2D
17 111, 1996; AGAIN: IN FOLLOWING: THE MISCONDUCT. "THE FACT THAT SUCH EVIDENCE
18 WAS AVAILABLE TO THE PROSECUTOR AND NOT SUBMITTED TO THE DE-
19 FENSE PLACES IT IN A DIFFERENT CATEGORY THAN IF IT HAD SIMPLY BEEN
20 DISCOVERED FROM A NEUTRAL SOURCE AFTER TRIAL. BUT NO! THE
21 STATES PROSECUTOR HAD AHMAD CHAZIT IN THE SHERIFFS CUSTODY FOR ONE
22 AND A HALF YEARS. FOR THIS REASON THE PETITIONER SHOULD NOT HAVE TO
23 SATISFY THE SEVERE BURDEN OF DEMONSTRATING THAT NEWLY DISCOVERED EVIDENCE
24 PROBABLY WOULD HAVE RESULTED IN ACQUITTAL. IF THE STANDARD APPLYS TO THE
25 USUAL MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE WERE THE
SAME WHEN THE EVIDENCE WAS IN THE STATES POSSESSION AS WHEN IT WAS FOUND

1 IN A NEUTRAL SOURCE, THERE WOULD BE NO SPECIAL SIGNIFICANCE TO THE PRO -
2 SECUTOR'S OBLIGATION TO SERVE THE CAUSE OF JUSTICE". IN VIEWING SEE:
3 UNITED STATES V. LINDA AGURS, 427 US 97, 49 L ED 2D 342, 96 SCT 2392 (1976).

4
5 PETITIONERS ARGUMENT IS FACTUAL

6 PETITIONER, EXPRESSES HIS ACTUAL INNOCENCE WITH NEWLY DISCOVERED
7 EVIDENCE OF A [SO CALLED CO-DEFENDANT] HE JUST RECENTLY LEARNED
8 ABOUT BY READING A "PSI" REPORT DONE BY PAROLE AND PROBATION,
9 AFTER PETITIONER WAS FOUND GUILTY, NOT DURING HIS TRIAL PROCEEDINGS
10 IN WHICH, THE STATE OF NEVADA PROSECUTOR'S OFFICE VIOLATED THE
11 14TH AMENDMENT RIGHTS ON DUE PROCESS AND EQUAL PROTECTION
12 OF THE LAW. IF THE PROSECUTOR'S INTENTIONS WAS FORTHRIGHT IN
13 ADJUDICATING THE LAW. THEY WOULD HAVE PRODUCED HIM AS A CO-
14 DEFENDANT WITH A SENTENCE HOWEVER, HIS DISCOVERY WAS IM-
15 PORTANT TO PETITIONER'S TRIAL; NOT TO MENTION HE ALIEN CHAZIZ
16 WAS POSITIVELY IDENTIFIED AS THE PERSON WHOM COMMITTED ALL
17 CHARGED COUNTS HE PLEAD GUILTY TO PURSUANT TO HIS PLEA-
18 AGREEMENT - WHAT WAS ACTUALLY IN HIS DISCOVERY THAT I
19 WAS NOT AWARE OF? THE STATES PROSECUTOR KNEW THEY INTENTIONAL
20 LY VIOLATED STATES STATUTE, AND THE FOURTEENTH AMENDMENT RIGHT OF THE
21 PETITIONER WHEN THEY FABRICATED DNA AND INTENTIONALLY USED ALL
22 OF IT SO PETITIONER COULD INDEPENDANTLY TEST WHICH IS A VIOLATION
23 OF CONSTITUTIONALITY.

1 INEFFECTIVENESS OF COURT APPOINTED

2 COUNSELS OF SEVEN LAWYER'S ABA

3 BASED UPON STRICKLAND V. WASHINGTON, 466 U.S. 668, 80 L. Ed
4 2d 674, 104 S.Ct 2052 (1984). TWO PART TEST OF EFFECTIVE ASSIS-
5 TANCE OF DEFENSE COUNSEL HELD: (1) REASONABLY EFFECTIVE
6 ASSISTANCE AND (2) REASONABLE PROBABILITY OF DIFFERENT RE-
7 SULT WITH EFFECTIVE ASSISTANCE.

8 ISSUE ONE: EACH AND ALL SEVEN^u COURT APPOINTED COUNSEL'S
9 WERE (INEFFECTIVE) FOR THESE SET OF REASONS ESTABLISHED
10 BY STRICKLAND V. WASHINGTON AND NEVADA RULES OF PROFESSION-
11 AL CONDUCT:

12 ONE; PURSUANT TO, Nev. Rules of Prof'l Conduct 1.18 (2) Quotes:

13 (2) THE LAWYER WHO RECEIVED THE INFORMATION TOOK REASONABLE
14 MEASURES TO AVOID EXPOSURE TO MORE DISQUALIFYING IN-
15 FORMATION THAN WAS REASONABLY NECESSARY TO DETERMINE
16 WHETHER TO REPRESENT THE PROSPECTIVE CLIENT; AND

17
18 (i) THE DISQUALIFIED LAWYER IS TIMELY SCREENED FROM ANY
19 PARTICIPATION IN THE MATTER AND IS APPORTIONED NO PART OF THE
20 FEE THEREFOR; AND

21
22 (ii) WRITTEN NOTICE IS PROMPTLY GIVEN TO THE PROSPECTIVE
23 CLIENT.

24
25 PETITIONER QUOTE; EACH AND EVERY^u COURT APPOINTED LAWYER TOOK REASON-

1 ANY MEASURES TO AVOID EXPOSURE TO MORE DISQUALIFYING INFORMATION
2 ABOUT (AHUD CHAZIZ). THIS INFORMATION WAS NECESSARY TO ESTABLISH TO
3 THE ACTUAL INNOCENCE OF YOUR PETITIONER YET, JUST THE MENTION
4 OF HIS NAME WOULD HAVE INTRODUCED VALUABLE INFORMATION OF NON-
5 PARTICIPATION OF PETITIONER IN THIS CASE.

6 TWO: PURSUANT TO. Nev. Rules of Prof'l Conduct 3.4. (a) quotes:

7 (c) UNLAWFULLY OBSTRUCT ANOTHER PARTY'S ACCESS TO EVIDENCE
8 OR UNLAWFULLY ALTER, DESTROY OR (CONCEAL) A DOCUMENT OR OTHER
9 MATERIAL HAVING POTENTIAL EVIDENTIARY VALUE. A LAWYER SHALL
10 NOT COUNSEL OR ASSIST ANOTHER PERSON TO DO ANY SUCH ACT.

11 PETITIONER QUOTE; EACH COURT APPOINTED LAWYER "KNEW" THAT (AHUD CHAZIZ) HAD
12 BEEN ARRESTED ONE AND A HALF YEARS PRIOR TO PETITIONER'S ARREST AND, (KNEW)
13 THAT HE WAS BEING HELD TO THE SAME CHARGES AS YOUR PETITIONER FAILING IN
14 THEIR OBLIGATIONS/DUTIES TO BRING ABOUT A SEVERANCE OF MOTION YET!
15 HID AWAY VALUABLE MATERIAL EVIDENCE THAT WOULD HAVE ACQUITTED THE
16 PETITIONER OF ALL ALLEGED CHARGES.

17 " AN ATTORNEY WHO ENGAGES IN PROHIBITED COMMUNICATIONS
18 VIOLATES THE ATTORNEY'S ETHICAL DUTY TO OBEY THE OBLIGATIONS OF THE
19 TRIBUNAL. SINCE THE PROCEDURE FOR DISCOVERY IS WELL ESTABLISHED,
20 AN ATTORNEY MAY ALSO BE IN VIOLATION OF THE RULE PROHIBITING CON-
21 DUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE. ERICKSON V.
22 NEWMAR CORP., 87 F.3d 298 (9th Cir. 1996). " AND "PROSECUTOR'S
23 WILLFUL FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS AND DISTRICT
24 COURT ORDERS PERTAINING THERETO MAY CONSTITUTE PROFESSIONAL MIS-
25 CONDUCT. SCHLAFFER V. STATE, 115 NEV. 167. 979 P.2d 712 (1999).

1 PETITIONER QUOTES; AS SOON AS AHUD CHAZIZ WAS IN THE CUSTODY OF
2 THE STATES PROSECUTION, HE WAS GIVEN A DIFFERENT CASE NO. C229335
3 PETITIONER CASE NO. C212968. STATE VIOLATED COURT PROCEDURE AND
4 THE RIGHTS OF PETITIONERS FOURTEENTH AMENDMENT, BY NOT JOINER
5 OF OFFENSE PURSUANT TO NRS 174.165

6 THREE; PURSUANT TO, Nev. Rules of Prof'l Conduct 3.8 (d)

7 (d) THE PROSECUTOR IN A CRIMINAL CASE SHALL:

8 MAKE TIMELY DISCLOSURE TO THE DEFENSE OF ALL EVIDENCE

9 OR INFORMATION KNOWN TO THE PROSECUTOR THAT TENDS TO NEGATE

10 THE GUILT OF THE ACCUSED OR MITIGATES THE OFFENSE, AND IN

11 CONNECTION WITH SENTENCING, DISCLOSE TO THE DEFENSE AND TO

12 TRIBUNAL ALL UNPRIVILEGED MITIGATING INFORMATION KNOWN

13 TO THE PROSECUTOR, EXCEPT WHEN THE PROSECUTOR IS RELIEVED

14 OF THIS RESPONSIBILITY BY A PROTECTIVE ORDER OF THE TRIBUNAL;

15 PETITIONER QUOTES; THIS CAUSE OF ACTION WAS "INTENTIONAL STRUCTURAL ERROR,"

16 DESIGNED CAUSE A MISCHARRAGE OF JUSTICE, THE PRODUCTION OF PIECEFULLY PUT

17 TOGETHER DECISION CAME BY THE STATES PROSECUTOR, IN WHICH VIOLATED DUE

18 PROCESS AND EQUAL PROTECTION OF THE LAW. [IF] RULE 3.8 (d) GUARANTEE'S

19 THE PROSECUTOR'S DUTIES YET! THAT PROSECUTOR EVADE - AVOID, THAT LAW

20 ON RULE'S OF PROFESSIONAL CONDUCT JUST TO AVOID JOINER; THIS

21 PROSECUTOR NEGATED THE GUILT OF THE ACCUSED. MR HENDERSON MUST BE

22 INNOCENT AND MR CHAZIZ MUST HAVE [NOT] KNOWN MR. HENDERSON

23 BECAUSE, THE STATES PROSECUTOR FAILED TO MENTION MR CHAZIZ ANY-

24 WHERE IN HENDERSON'S CASE BUT, AFTER HENDERSON WAS FOUND

25 GUILTY - PAROLE; PROBATION BRING MR CHAZIZ AS A CO-DEFENDANT.

1 IN BRADY V. MARYLAND, 373 U.S.83, 10 L Ed 2d 215, 83 S.Ct.1194. BOALIT AD--
2 MITTED THE ACTUAL HOMICIDE, WAS WITHHELD BY THE PROSECUTION AND DID
3 NOT COME TO PETITIONER'S NOTICE UNTIL AFTER HE HAD BEEN TRIED, CONVICTED
4 AND SENTENCED, AND AFTER HIS CONVICTION HAD BEEN AFFIRMED.

5 PETITIONER, JOSEPH HENDERSON'S CASE IS EXACTLY THE SAME YET!
6 THE STATE PROSECUTOR (HIO) AWAY MR. CHAZIT WITH ANOTHER CASE NUMBER
7 STRUCTURAL INTENT TO CAUSE HARM OR A RACIAL PROFILE BECAUSE OF MR.
8 HENDERSON'S PAST HISTORY, HOWEVER IT MAY BE; WHY DID PROSECUTOR
9 VIOLATE STATUTE AND HENDERSON'S CONSTITUTIONALITY PRIVILEGES WITH
10 MISCONDUCT?

11 COURT APPOINTED TRIAL COUNSEL SHOULD HAVE KNOWN THAT CASE NO.
12 C 229335 AHMO CHAZIT WAS FACING THE SAME CHARGES, PLEAD GUILTY
13 AND WAS 100% IDENTIFIED BY BOTH VICTIMS, AND HIS TRUE CO DEFEN--
14 DANT TESTIFIED AGAINST HENI-- ALL THIS INFORMATION WAS WITHHELD
15 FROM HENDERSON. SEE ENNIS V. THE STATE OF NEVADA, 122 NEV. 694, 137
16 P.3d 1095, 2006 NEV. LEXIS 78; 122 Nev. Adv. Rep. 60.

17 EVIDENTIARY HEARING IS

18 WARRANTED

19 PURSUANT TO GEBERS V. STATE OF NEVADA, 118 NEV. 500, 50 P.3d 1092
20 2002. PETITIONER BOTH FILED POST-CONVICTION WRIT OF HABEAS CORPUS FOR INEF-
21 EFFECTIVE ASSISTANCE OF COUNSEL; AND IT WAS ESTABLISHED THAT BOTH DEFENDANTS
22 DESERVED AN EVIDENTIARY HEARING BECAUSE OF THE INEFFECTIVENESS THEY BOTH
23 RECEIVED BECAUSE OF PROCEDURAL RIGHTS THAT WERE VIOLATED AND CONSTITUTIONAL
24 VIOLATION. A REVIEW OF THE SO-CALLED CODEFENDANT [MUST] BE INVEST-
25 IGATED BY JUDICIAL REVIEW BOARD OR CHIEF JUSTICE TO WEIGH OUT IF THE

1 ALLEGATIONS OF AHMAD Y. CHAZIZ CASE C 229335 IN DEPARTMENT 21
2 IS TRUE AND CORRECT, THAT THE STATES PROSECUTOR DID IN FACT CAUSE
3 A MISCARriage OF JUSTICE BY NOT FOLLOWING "JOINDER OF OFFENSES"
4 OF TWO CODEFENDANTS AND FAILING TO FILE SEVERANCE" PURSUANT
5 TO NRS 174.165. SIXTH AMENDMENT VIOLATION:

6 ARGUMENT

7 PETITIONER HAS MAINTAINED HIS INNOCENSE FOR SIX -
8 TEEN YEARS; THE STATES PROSECUTOR VIOLATED CHAPTER 174 AND
9 6TH/14TH AMENDMENT RIGHT TO THE U.S. CONSTITUTION DE-
10 PRIVING ME OF MY LIBERTY INTEREST AS A UNITED STATES
11 CITIZEN; THE PROSECUTION OFFICE VIOLATED ABA ON
12 PROFESSIONAL CONDUCT INWHICH IS GOVERNED BY NEVADA
13 REVISED STATUTES, CONCEALING EVIDENCE IN ANOTHER
14 CASE THAT PURELY PERTAINED TO THE INNOCENSE OF YOUR
15 PETITIONER WAS "STRUCTURAL ERROR WITH THE INTENT TO
16 CAUSE SERIOUS HARM TO AN INNOCENT MAN," EVIDENTI-
17 ARY HEARING MUST BE HELD IN THE EYES OF JUSTICE AND
18 A FULL SCALE INVESTIGATION IS REQUIRED BY PETITIONER,
19 DATED THIS 4th DAY OF JULY 2021.

20
21 RESPECTFULLY SUBMITTED

22
23 BY: Joseph Henderson 67224
24 JOSEPH HENDERSON 67224
25
26
27
28

CERTIFICATE OF SERVICE

I Joseph Henderson swear under the penalty of PER-
JURY THAT I MAILED A TRUE AND CORRECT COPY OF THIS
MEMORANDUM IN SUPPORT OF "SUCCESSIVE" WRIT OF
HABEAS CORPUS PETITION [NEWLY DISCOVERED EVIDENCE]
TO THE FOLLOWING:

CLERK OF THE COURT
EIGHTH JUDICIAL DIST
200 LEWIS AVENUE
LAS VEGAS, NV 89101

DISTRICT ATTORNEY OFFICE
200 LEWIS AVENUE
LAS VEGAS, NV 89101

BY: Joseph Henderson

DATED THIS 4TH DAY OF JULY 2021.

1 JOSEPH HENDERSON
2 NDOC # 67224
3 ELY STATE PRISON
4 P.O. Box 1989
5 ELY, NEVADA, 89301
6 Proper Person

FILED
AUG 25 2021

John T. Williams
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

7 JOSEPH HENDERSON,)
8 Petitioner/Defendant,)
9 vs.)
10 WARDEN WILLIAM GETTARE)
11)
12 STATE OF NEVADA,)
13 Respondent.)

* * *

A-21-840121-W
Dept. 2
CASE NO.
DEPT. NO.

EX PARTE MOTION FOR
ORDER TO TRANSPORT
PRISONER

DATE:
TIME:

14 COMES NOW, Defendant JOSEPH HENDERSON in proper person, and
15 moves this Court for an Order directing the NDOC to transport the Petition/Defendant from
16 Ely State Prison, Ely, Nevada, to Clark County in order to be present in time for the hearing set
17 for 4 day of _____, 2021, Department No. _____, Case No. _____.

18 This Motion is based on the papers on file herein and the Affidavit of Petitioner attached
19 hereto.

20 Dated this 4th day of JULY, 2021.

Submitted by:

Joseph Henderson
Defendant

CLERK OF THE COURT

AUG 19 2021

RECEIVED

CERTIFICATE OF SERVICE BY MAIL

I, JOSEPH HENDERSON, hereby certify pursuant to Rule 5(b) of the NRCP, that on this 4th day of JULY, 2001, I served a true and correct copy of the above-entitled MOTION TO TRANSFER postage prepaid and addressed as follows:

CLERK OF THE COURT
8TH JUDICIAL DIST COURT
200 LEWIS AVENUE
LAS VEGAS, NV 89101

DISTRICT ATTORNEYS OFFICE
200 LEWIS AVENUE
LAS VEGAS, NV 89101

Signature

Joseph Henderson

Print Name JOSEPH HENDERSON

Ely State Prison

P.O. Box 1989

Ely, Nevada 89301-1989

AFFIDAVIT OF: JOSEPH A. HENDERSON

STATE OF NEVADA)
 : ss
COUNTY OF CLARK)

I, JOSEPH HENDERSON, do hereby affirm under penalty of perjury that the assertions of this affidavit are true:

1. That I am the Petitioner in the above-entitled action and that I make this affidavit in support of EX PARTE MOTION FOR ORDER TO TRANSPORT PRISONER, attached hereto.

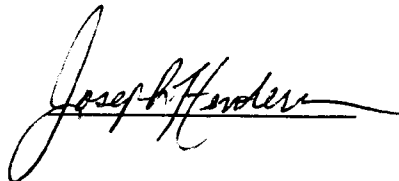
2. That I am over eighteen (18) years of age; of sound mind; and have a personal knowledge of and, am capable to testify to the matter as stated herein.

4. That on ____ day of _____, 200__, I have a hearing scheduled at ____ a.m. in Department No. ____, and request the court to order the NDOC to transport me for set hearing

I, JOSEPH HENDERSON, do hereby state and declare under penalty of perjury and pursuant to NEVADA REVISED STATUTE 208.165 that the foregoing statements are true and correct, and to the best of my own personal knowledge and belief, as to any such matter that may be stated upon belief, I sincerely believe them to be true,

DATED THIS 4th day of JULY, 2001.

Affiant,



AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

MOTION TO TRANSPORT

(Title of Document)

filed in District Court Case No. C 212968

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or
for an application for a federal or state grant.

Joseph J. Linder
(Signature)

7-4-21
(Date)

1 JOSEPH HENDERSON
2 ELY STATE PRISON
3 ELY, NV 89301

FILED
AUG 25 2021

7
Clerk of Court
CLERK OF COURT

4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 NAME, JOSEPH HENDERSON,
9 PETITIONER,

A-21-840121-W
Dept. 2

10 -VS-

CASE NO.

11 NAME, STATE OF NEVADA,
12 RESPONDANT,

AFFIDAVIT/DECLARATION

UNDER PENALTY OF PERJURY

13
14 FARETTA V. CALIFORNIA 422 US 806, 45 L ED 2d
15 562, 95 S.Ct 2525

16
17 COMES NOW, PLAINTIFF, JOSEPH HENDERSON, BY AND THROU-
18 GH PRO SE LITIGANT AND, HEREBY STATES THE FOLLOWING;
19 EACH AND EVERY COURT APPOINTED COUNSEL ORDERED TO
20 REPRESENT YOUR PETITIONER BY THIS EIGHTH JUDICIAL DIS-
21 TRICT COURT, HAS WITHHELD INFORMATION CONCERNING
22 EXCULPATORY AND VALUABLE EVIDENCE AWAY FROM
23 PETITIONER. I HAVE BEEN UNFAIRLY REPRESENTED
24 ON ALL STAGES OF PAST APPEALS. I PERSONALLY WILL
25 REPRESENT MYSELF UNTIL "I" DESIDE TO HERE

CLERK OF THE COURT
AUG 19 2021
RECEIVED

1 COUNSEL OUTSIDE OF THE EIGHTH JUDICIAL DISTRICT
2 COURT, WITH THE PURCHASE OF FUNDS BY MY FAMILY OR
3 SELF.

4 I INVOKE MY FIRST AMENDMENT RIGHT BECAUSE, I
5 DON'T TRUST THE APPOINTMENT OF COUNSEL BY THIS COURT
6 OR THE CLOSE AFFILIATION OF THE CORRUPTION OF THE
7 DISTRICT ATTORNEY'S OFFICE.

8 I THEREFORE STAND ON FARETTA V. CALIFORNIA AND
9 WILL REPRESENT MYSELF ON THIS "HABEAS CORPUS WRIT
10 OF SUCCESSIVE PETITION ON NEWLY DISCOVERED EVIDENCE"
11 AND WILL HIRE COUNSEL AT MY OWN NEED.

12 DATED THIS 4TH DAY OF JULY 2021

13
14 RESPECTFULLY SUBMITTED

15
16 BY: Joseph Henderson 61224

17 JOSEPH HENDERSON

18 ELY STATE PRISON

19 P.O. BOX 1989

20 ELY, NEVADA 89301

21
22 PETITIONER IN PRO-SE

23 ///

24 ///

25 ///

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCp Rule 5 (b), I hereby certify that I am the Petitioner/Defendant named herein
and that on this 4TH day of JULY, 2021, I mailed a true and correct copy of this
foregoing AFFIDAVIT/DECLARATION to the following:

DISTRICT COURT

200 LEWIS AVE

LAS VEGAS NV

DISTRICT ATTORNEY

200 LEWIS AVE

LAS VEGAS, NV

BY: Joseph J. Henderson

Heather S. Hume
CLERK OF THE COURT

PPOW

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Joseph A Henderson,

Petitioner,

vs.

Warden William Guttere,

Respondent,

Case No: A-21-840121-W
Department 2

**ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS**

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on August 25, 2021. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 16th day of December, 2021, at the hour of

2:00 PM o'clock for further proceedings.

Dated this 11th day of October, 2021

Carli Kierny

District Court Judge
DSB A64 584E A132
Carli Kierny
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Henderson, Plaintiff(s) CASE NO: A-21-840121-W
7 vs. DEPT. NO. Department 2
8 Warden William Guttere,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 Electronic service was attempted through the Eighth Judicial District Court's
13 electronic filing system, but there were no registered users on the case.

14 If indicated below, a copy of the above mentioned filings were also served by mail
15 via United States Postal Service, postage prepaid, to the parties listed below at their last
16 known addresses on 10/12/2021

17 Joseph Henderson #67224
18 ESP
19 P.O. Box 1989
20 Ely, NV, 89301
21
22
23
24
25
26
27
28

DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
10/11/2021 2:27 PM
Steven D. Grierson
CLERK OF THE COURT



Joseph Henderson, Plaintiff(s)
vs.
Warden William Guttere, Defendant(s)

Case No.: A-21-840121-W
Department 2

NOTICE OF HEARING

Please be advised that the Ex Parte Motion for Order to Transport Prisoner in the above-entitled matter is set for hearing as follows:

Date: December 16, 2021
Time: 11:00 AM
Location: RJC Courtroom 16B
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

COURT COPY

27

Electronically Filed
10/11/2021

Annex. Linn
CLERK OF THE COURT

1 JOSEPH HENDERSON
2 DOP # 67224
3 PLAINTIFF IN PRO SE

4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 NAME, JOSEPH A. HENDERSON,
9 Plaintiff(s),

10 -vs-

11 NAME, STATE OF NEVADA, et.al.,
12 Defendant(s).

CASE NO. A-21-840121-W

DEPT NO. 2

DATE OF HEARING:

TIME OF HEARING:

13
14 MOTION TO AMEND PETITION:
15 NRS 34.724
16 EXHIBIT "A" ADDED ONLY

17 COMES NOW, JOSEPH HENDERSON, in PRO PER: INSTANT PETITION TO "AMEND"
18 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) FIRST AMENDED
19 PETITION "SUCCESSIVE" NEWLY DISCOVERED EVIDENCE.

20 PURSUANT TO NRS 34.724 PERSONS WHO MAY FILE PETITION: 3 (b)

21 QUOTES:

22 (b) THE MOTION IS FILED WITHIN 1 YEAR AFTER THE DATE ON
23 WHICH THE PERSON WAS CONVICTED, UNLESS THE PERSON
24 PLEADS "SPECIFIC" FACTS" DEMONSTRATING THAT SAME IM-
25 PEDIMENT EXTERNAL TO THE DEFENSE PRECLUDED BRING-
26 ING THE MOTION EARLIER;

27
28 PETITIONER FILES THIS MOTION TO AMEND THE EXHIBIT "A" PRESENTENCE

RECEIVED

SEP 30 2021

CLERK OF THE COURT

MEMORANDUM OF POINTS AND AUTHORITIES

INVESTIGATION REPORT;

LOPEZ V. KEY, 2017 U.S. Dist. LEXIS 233117 "THE COURT PROVIDED PETITIONER WITH THE OPPORTUNITY TO AMEND HIS PETITION TO CLARIFY AND CONCISELY PRESENT FACTS IN SUPPORT OF HIS GROUNDS FOR HABEAS RELIEF.

PETITIONERS ARGUMENT

PURSUANT TO THE FACT THAT, SO-CALLED CO-DEFENDANT AHUUD Y. CHAZIZ PARTING THE CASE NO C229335 IN DEPT 21 ON MARCH 16, 2009. THIS DEFENDANT WAS NEVER REVEALED TO PETITIONER AS A CO-DEFENDANT IN VIOLATION OF NRS 174.165 JOINDER/SEVERENCE THEREFORE PREJUDICING THE PETITIONERS NEVADA CONSTITUTIONAL RIGHTS ACCORDING TO THE 6TH AND 14TH AMENDMENT. AGAIN;

IN: LOPEZ V. KEY. PETITIONER HENDERSON PRESENT CLARITY AND CONCISELY FACTS IN SUPPORT OF MY GROUNDS AND, THE ISSUE AT HAND FOR RELIEF IN HIS SUCCESSIVE PETITION FOR NEWLY DISCOVERED EVIDENCE. IF THIS COURT COMPARE PETITIONERS ENTIRE CASE, THE EIGHTH DIST COURT WILL SEE THAT THIS NEWLY DISCOVERED EVIDENCE HAS NEVER BEEN ENTERED BY JOINDER OR SEVERENCE MOTION, AND MAKES THIS ISSUE A RELIEF BY HABEAS PETITIONERS ACT IN (NEWLY DISCOVERED EVIDENCE).

///

///

///

///

///

CONCLUSION

PETITIONER REQUEST THIS MOTION TO AMEND BY THE EXHIBIT
"A" PRESENTENCE REPORT BY PAROLE AND PROBATION SUPPORTING HIS FACTS
THAT THIS SO CALLED CODEFENDANT WAS THE PERSON OF INTEREST NOT
PETITIONER, SEE EXHIBIT "A".

RESPECTFULLY SUBMITTED

DATED THIS 30TH DAY OF 9-20-2021.

///

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///

///

///

///

///

Dated this 20TH day of September, 2021.

By: Joseph Henderson

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP Rule 5 (b), I hereby certify that I am the Petitioner/Defendant named herein
and that on this 30th day of Sept, 2021, I mailed a true and correct copy of this
foregoing MOTION TO AMEND to the following:

DISTRICT COURT 8TH

200 LEWIS AVE

LV, NV 89101

DISTRICT ATTORNEY

200 LEWIS AVE

LV, NV 89101

BY:

Joseph Henderson

AFFIRMATION

Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, MOTION TO AMEND

(Title of Document)

Filed in case number: A-21-840121-W.

☒ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A Specific state or federal law, to wit

Or

☐ For the administration of a public program

Or

☐ For an application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: Sept 28th 2021

Joseph Henderson
(Signature)

JOSEPH A HENDERSON
(Print Name)

(Attorney for)

Case No. A-21-840121-W

Dept. No. 2

Court
Copy

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

JOSEPH A. HENDERSON
Petitioner,

CASE NO. A-21-840121-W
DEPT NO. 2

v.

WARDEN: WILLIAM GETTIE
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)
FIRST AMENDED PETITION
"SUCCESSIVE"
NEWLY DISCOVERED EVIDENCE

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

EXHIBIT "A"

PRESENTENCE INVESTIGATION REPORT

NAMING: Ahud Yudia Chaziz AS A CO-DEFENDANT.

IN ANOTHER CASE NO. C229335 DEPT 21 ON

MARCH 16. 2009.

AUGUST 27. 2008. ISSUED

PRESENTENCE INVESTIGATION REPORT**JOSEPH ALEXANDER HENDERSON****CC#: C212968****Page 8**

Victim #1 began to fight with the other two suspects upstairs and was "pistol whipped" causing injuries to his scalp which bled profusely. Victim #2 was taken upstairs to the master bedroom by Mr. Henderson where he tied up the victim and sexually assaulted a second time with Mr. Henderson penetrating her vagina with his penis.

The suspects ransacked the home, taking cash and other items. Victim #2 freed herself and called 911.

VII. CO-DEFENDANT'S/OFFENDER'S INFORMATION

Ahud Yudja Chaziz is scheduled for trial under C229335, in Department XXI on March 16, 2009.

VIII. DEFENDANT'S STATEMENT

The defendant was interviewed at the Clark County Detention Center on July 30, 2008 and did not provide a written statement for the Court's review.

The defendant maintains his innocence in the instant offense and says he was not involved in the crime.

IX. VICTIM INFORMATION/STATEMENT

An information letter and claim form were mailed to both victims (VC2178712 and VC2178713) on July 22, 2008, however a claim has not been received. Telephone contact was made on August 12, 2008 with one victim and the impact forms were faxed. With no response, the undersigned telephoned both victims on August 15, 2008 and they offered the following impact statements:

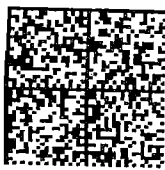
Victim #1 - (VC2178713) reported that he was affected emotionally, in his marriage, in his health and financially. He reported that the two victims were in the process of planning their wedding at the time of the instant offense and looked forward to having a large celebration and having children. Since the event, the two decided to elope and get married because they did not want to be the center of attention and have their guests dwell on how they were victimized. They have both decided to wait to have children because of the emotions that both continue to deal with due to the instant offense. The victim reports that he has gained 40 pounds, suffered depression, been diagnosed with diabetes and high blood pressure since the event. He believes this crime has taken 10 years off his life and asks who can ever pay for that time. Financially the victim reported that he sold the house where the event happened and had to disclose that it was the scene of a crime which caused him a \$50,000 loss in the transaction. In addition, he reported that he had planned to expand his practice significantly prior to the event and due to the event and the subsequent depression he suffered, abandoned the concept which could have developed into hundreds of thousands dollars of added income. He continually stated that the victim "tarnished" both the victims' lives with both victims constantly thinking who was "lurking around the next corner". The victim reported that he felt that his associates and patients still look at him as "that's the guy that got beat up and his wife got raped". He feels his manhood has been questioned by the event, even though he knows that he did everything possible to prevent it. He felt the defendant had the victims "cornered" and they easily could have been murdered. He described the defendant as a person with "no morals, no boundaries" and a "true predator" that could have taken the money and walked out but did not. He believes the defendant should be in front of a firing squad and in the least kept out of society. He said that 20 years is far too little as he fears the defendant would then be young enough to harm someone else. 50 years should be a minimum sentence.

Murphy Henderson 861034
P.O. Box 1489
Ely Nevada
89301

ELY STATE PRISON

SEP 27 2021

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10/11/2021

Heather L. Smith
CLERK OF THE COURT

1 JOSEPH A. HENDERSON
2 # 162224
3 P.O. BOX 1989
4 ELY, NV 89301

5
6
7
8 IN THE EIGHTH DISTRICT COURT OF THE
9 STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

10
11 JOSEPH A. HENDERSON
12 Petitioner,

CASE NUMBER:

A-21-840121-W
II

13 vs.

**REQUEST FOR EVIDENTIARY
HEARING**

14 WARDEN, WILLIAM, GETTARE
15 Warden; State of Nevada,
16 Respondents.

17
18 COMES NOW, JOSEPH HENDERSON the Petitioner, in proper person, and moves this Court
19 TO REVIEW THE EXHIBIT "A", AND GRANT PETITIONER evidentiary hearing. This
20 motion is made and based in the interest of justice.

21 THIS MOTION IS BASED UPON THE DEPRIVATION OF MRS 174.165 JOINER
22 AND SEVERANCE; FAILING TO APPLY EQUAL PROTECTION OF THE LAW, IN
23 VIOLATION OF PETITIONERS 14TH AMENDMENT RIGHT OF THE
24 NEVADA CONSTITUTION, ADOPTED BY OUR UNITED STATES CONSTI-
25 TUTION. EVIDENCE IN AMENDED PETITION IS FACTUAL INNOCENCE
26 ISSUED BY STATE AGENCYS.

27 ///

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SEP 30 2021
CLERK OF THE COURT

POINTS AND AUTHORITIES

THE U.S. SUPREME COURT WILL UPHOLD A DEFENDANT'S ALLEGATIONS PROVIDING THAT THE DEFENDANT CHALLENGES HAVE LEGAL MERITS TO THE EVIDENTIARY HEARING, WHERE THE ALLEGATIONS OFFERED BY DEFENDANT IF TRUE, WOULD ENTITLE HIM OR HER TO RELIEF AND, THE ALLEGATIONS CONTRADICTS THE RECORDS OR ARE "INHERENTLY INCREDIBLE". U.S. v. MCGILL, 11 F.3d 223, 226 (1st Cir 1993).

PETITIONER'S FACTS

THE STATES PROSECUTOR, WILLFULLY AND KNOWINGLY HID OUT AHMED Y. CHAZIZ IN CASE C229335 IN DEPT 21 FOR TWO TO THREE YEARS WITHOUT "NOTICE" TO PETITIONER OR COUNSEL OF RECORD THE DISTRICT COURT, VIOLATING PROCEDURAL RIGHTS OF THE CONSTITUTION CHAPTER 174 AND FEDERAL RULE 12.

CONCLUSION

PETITIONER DESERVES AN EVIDENTIARY HEARING ON THESE FACTS ALONE, AND THE STATE NEED TO EXPLAIN AWAY THIS SERIOUS VIOLATION OF RIGHTS.

///

///

///

Dated this 20th day of September, 2021.

By: Joseph Henderson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on September 20, 20 21, he served a copy of the foregoing Ex Parte Motion for and Request for Evidentiary Hearing by personally mailing said copy to:

District Attorney's Office
Address: 200 LEWIS AVE
LAS VEGAS, NV 89101

Warden
Address: P.O. BOX 1989 ESP
ELY, NEVADA 89301

Joseph Henderson
Petitioner

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding REQUEST

FOR EVIDENTIARY HEARING
(Title of Document)

filed in District Court Case number _____

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or for an application
for a federal or state grant.

Joseph Henderson
Signature

9-20-2021
Date

JOSEPH A. HENDERSON
Print Name

Title

Missouri Foundation 67004
P.O. Box 1889
Gey Nevada
89301

ELY STATE PRISON

SEP 27 2021

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Las Vegas Nevada
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Heather L. Linn
CLERK OF THE COURT

JOSEPH A. HENDERSON

67224 / Pro Per
Ely State Prison
P.O. BOX 1989
ELY, NV 89301

IN THE EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA

Plaintiff,

vs.

JOSEPH A. HENDERSON

Defendant

Case No.:

A-21-840121-W

Dept No.:

II

Notice of Motion

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE, that REQUEST FOR EVIDENTIARY
HEARING.

will come on for hearing before the above-entitled Court on the _____ day of
_____, 20____, at the hour of _____ o'clock ____m. in
Department _____, of said Court.

DATED this 20th day of September, 2021.

Joseph Henderson

67224 / Pro
Per
Ely State Prison
P.O. BOX 1989
ELY, NV 89301

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SEP 30 2021

CLERK OF THE COURT

Missouri Division 61224
J.D. By 11821
Only needed
89301

ELY STATE PRISON

SEP 27 2021

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Des Moines, IA 50319
89101



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N/A

Case No. A-21-840121-W

Dept. No. 2

FILED

DEC 03 2021

John T. Johnson
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

JOSEPH A. HENDERSON
Petitioner,

v.

WARDEN: WILLIAM GETTEE
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

SECOND AMENDED PETITION
SUCCESSIVE
NEWLY DISCOVERED EVIDENCE

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

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NOV 22 2021

CLERK OF THE COURT

1

1 (b) If sentence is death, state any date upon which execution is scheduled:....

2 6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

3 Yes No ☒

4 If "yes," list crime, case number and sentence being served at this time:

5
6
7 7. Nature of offense involved in conviction being challenged: ROBBERY, SEXUAL ASSAULT, KIDNAPING
8 ETC

9 8. What was your plea? (check one)

10 (a) Not guilty ☒

11 (b) Guilty

12 (c) Guilty but mentally ill

13 (d) Nolo contendere

14 9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a
15 plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was
16 negotiated, give details:

17
18 10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

19 (a) Jury ☒

20 (b) Judge without a jury

21 11. Did you testify at the trial? Yes No ☒

22 12. Did you appeal from the judgment of conviction? Yes ☒ No

23 13. If you did appeal, answer the following:

24 (a) Name of court: EIGHT DISTRICT / NEVADA SUPREME COURT

25 (b) Case number or citation: C212968

26 (c) Result: denied

27 (d) Date of result: 11-4-09

28 (Attach copy of order or decision, if available.)

1 14. If you did not appeal, explain briefly why you did not:

2

3

4 15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any
5 petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ☒ No

6 16. If your answer to No. 15 was "yes," give the following information:

7 (a) (1) Name of court: NEVADA SUPREME COURT

8 (2) Nature of proceeding: Appeal denied

9

10 (3) Grounds raised: DUE PROCESS VIOLATIONS (3)

11

12

13 (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☒ No

14 (5) Result: Denied

15 (6) Date of result: 8-10-10

16 (7) If known, citations of any written opinion or date of orders entered pursuant to such result:

17 don't have discovery

18 (b) As to any second petition, application or motion, give the same information:

19 (1) Name of court: 8th DISTRICT

20 (2) Nature of proceeding: denied

21 (3) Grounds raised: DUE PROCESS VIOLATIONS

22 (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes No ☒

23 (5) Result: denied

24 (6) Date of result: 2-6-11

25 (7) If known, citations of any written opinion or date of orders entered pursuant to such result:

26 don't have any discovery

27 (c) As to any third or subsequent additional applications or motions, give the same information as above, list
28 them on a separate sheet and attach.

1 (d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any
2 petition, application or motion?

3 (1) First petition, application or motion? Yes ☒ No

4 Citation or date of decision: 6-8-11

5 (2) Second petition, application or motion? Yes ☒ No

6 Citation or date of decision: 7-4-12

7 (3) Third or subsequent petitions, applications or motions? Yes ☒ No

8 Citation or date of decision: 9-14-16

9 (e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you
10 did not. (You must relate specific facts in response to this question. Your response may be included on paper which
11 is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in
12 length.).....

13
14 17. Has any ground being raised in this petition been previously presented to this or any other court by way of
15 petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

16 (a) Which of the grounds is the same: NO

17
18 (b) The proceedings in which these grounds were raised: NO

19
20 (c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this
21 question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your
22 response may not exceed five handwritten or typewritten pages in length.) NEWLY discovered
23 EVIDENCE SEE ATTACHED MEMORANDUM SUCCESSIVE

24 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached,
25 were not previously presented in any other court, state or federal, list briefly what grounds were not so presented,
26 and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your
27 response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not
28 exceed five handwritten or typewritten pages in length.) JUST discovered evidence

1
2 19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing
3 of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in
4 response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the
5 petition. Your response may not exceed five handwritten or typewritten pages in length.) yes
6

7 20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment
8 under attack? Yes No ☒

9 If yes, state what court and the case number:
10

11 21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on
12 direct appeal: VILATE RADOSTA, BISSETTE, PATRICK KICE, JASON CARR ETC.
13

14 22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under
15 attack? Yes No ☒

16 If yes, specify where and when it is to be served, if you know:
17

18 23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the
19 facts supporting each ground. If necessary you may attach pages stating additional grounds and facts
20 supporting same.
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(a) Ground ONE: SEE- MEMORANDUM IN SUPPORT OF "SUCCESSIVE"
WRIT OF HABEAS CORPUS PETITION
[NEWLY DISCOVERED EVIDENCE]

Supporting FACTS (Tell your story briefly without citing cases or law.):

1 (b) Ground TWO: FOURTH AMENDMENT UNREASONABLE SEIZURE; FIFTH
2 AMENDMENT NOT TO BE A WITNESS AGAINST MYSELF; SIX AMENDMENT
3 RIGHT TO COUNSEL; FOURTEENTH AMENDMENT DUE PROCESS EQUAL OP -
4 OPORTUNITY TO BE PROTECTED BY PROCEPURE RIGHTS

5 Supporting FACTS (Tell your story briefly without citing cases or law.):
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GROUND TWO : FOURTH SIXTH AND FOURTEENTH AMENDMENT UNREASONABLE SEARCH AND SEIZURES; GUARANTEEING A CRIMINAL CASE THE RIGHT TO COUNSEL; AND THE RIGHT TO DUE PROCESS AND EQUAL OPPORTUNITY TO BE PROTECTED BY PROCEDURAL RIGHTS. FIFTH AMENDMENT AGAINST HIMSELF. ^{TO BE A WITNESS}

SUPPORTING FACTS:

ON 2/16/2005 ZO, PETITIONER WAS IN THE CUSTODY OF METRO SHERIFF C.C.D.C., WHEN THE STATE OF NEVADA, OBTAINED A WARRANT TO SWAB PETITIONERS MOUTH WITHOUT THE PRESENCES OF DEFENSE COUNSEL, AND OR, IN VIOLATION OF "MARIKWA RIGHTS" THIS SEARCH WARRANT WAS BY FORCE, AND WITHOUT THE PRESENCE OF COUNSEL.

THE PRIVACY INTEREST OF THE PETITIONER WAS DISREGARDED BY THE EIGHTH JUDICIAL DIST, DISTRICT ATTORNEY OFFICE, AND DEFENSE COUNSEL FOR NOT INVESTIGATING THE WARRANTS LIMITED SEARCH AS WELL AS PETITIONERS DNA IN THE (NEVADA CRIMINAL DATABASE), "RETURN WARRANT" WAS NEVER HONORED CAUSING A PREJUDICE AFFECT UPON THE PETITIONERS CONSTITUTIONAL RIGHT TO BE FREE FROM UNJUSTIFIED PROSECUTION.

ISSUE ONE

1. AFTER BEING ARRESTED PETITIONER WAS COMPELLED TO GIVE DNA FROM A SEARCH WARRANT BY FORCE TO ESTABLISH WHETHER OR NOT HE WAS AT THE SCENE OF A CRIME PURSUANT TO: NRS 176.09123.

2. WHEN PETITIONER WAS BEING COMPELLED TO GIVE UP HIS DNA, PETITIONER DID NOT WAIVE, IN WRITING HIS 6TH AMENDMENT RIGHT TO HAVE COUNSEL PRESENT, AND

3. BECAUSE PETITIONER DID NOT HAVE COUNSEL PRESENT DURING THE TAKING OF MY DNA TO BE USED AGAINST ME, THE COURT LOST JURISDICTION TO PROSECUTE ME BECAUSE, MY RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED DURING THE TAKING OF MY DNA, AND AS A RESULT I WAS NOT

1 ALLOWED TO PRESERVE THAT SAME DNA EVIDENCE FOR MY DEFENSE, THIS
2 CONVICTION CONSIDERED "VOID"!

3
4 - SUPPORTING CASE LAW -

5
6 ONE: BOYD V. UNITED STATES,

7 116 U.S. 616, 12 S. CT. 574, 29 L. ED. 746 (1886) (CONVICTION REVERSED)

8 TWO: POWELL V. ALABAMA,

9 287 U.S. 45, 53 S. CT. 55, 77 L. ED. 158 (1932) (JUDGMENT REVERSED)

10 THREE: JOHNSON V. ZEPBST,

11 82 L. ED 1461, 304 U.S. 458 (1938) (CONVICTION REVERSED) CONVICTION

12 CONSIDERED "VOID" FOR LACK OF JURISDICTION DUE TO DENIAL OF
13 EFFECTIVE ASSISTANCE OF COUNSEL.

14
15 - INTENTIONAL PREJUDICE -

16
17 EXHAUSTED ONE: AFTER BEING ARRESTED PETITIONER WAS COMPELLED TO
18 GIVE DNA BY SEARCH WARRANT UNDER FORCE, TO ESTABLISH WHETHER OR NOT
19 HE WAS AT THE SCENE OF A CRIME. PURSUANT TO "MIRANDA RULE" THE
20 STATE OF NEVADA VIOLATED MIRANDA CAUSING A DOMINO EFFECT OF
21 CONSTITUTIONAL VIOLATIONS WITH SEARCH-SEIZURE 4TH, ABSENCE OF COUNSEL
22 DURING THE TAKING OF DNA 6TH, AND DUE PROCESS AND
23 EQUAL PROTECTION 14TH AMENDMENT RIGHTS WAS DISREGARDED AND
24 PROCEDURAL RULES WAS VIOLATED. PETITIONER CANNOT FACE A TRIAL
25 UNDER DNA THAT WAS TAKEN WITHOUT THE PRESENCE OF COUNSEL.
26 PURSUANT TO "MIRANDA V. ARIZONA" BECAUSE THAT DNA WAS USED A-
27 GAINST PETITIONER WHEN I, WAS REFUSED TO TEST THE SAME EVIDENCE,
28 THIS ESTABLISHED PREJUDICE/INTENTIONAL HARM.

EXHAUSTED TWO: PURSUANT TO "Miranda Rule," THE DOCTRINE THAT A CRIMINAL SUSPECT IN POLICE CUSTODY MUST BE INFORMED OF CERTAIN CONSTITUTIONAL RIGHTS BEFORE BEING INTERROGATED. THE SUSPECT [MUST] BE ADVISED THE RIGHT TO HAVE AN ATTORNEY PRESENT. ANY EVIDENCE OBTAINED DURING THE INTERROGATION CANNOT BE USED AGAINST THE SUSPECT AT TRIAL. MIRANDA V. ARIZONA, 384 U.S. 436, 86 S.Ct. 1602 (1966). (THE STATE OF NEVADA, PROSECUTION, DETECTIVE, FAILED TO READ THE MIRANDA RULE DURING THEIR INTERROGATION OF FORCEFUL TAKING OF MY DNA, WOULDN'T ALLOW ME COUNSEL AS PRESCRIBED THROUGH Miranda Rule, AND DID USE MY DNA AGAINST ME AT TRIAL WITHOUT ALLOWING ME THE SAME PROCEDURAL RIGHTS THE EIGHTH JUDICIAL COURT ONLY ALLOWED THEM.).

- UNCONSTITUTIONAL -

EXHAUSTED THREE: PURSUANT TO "MIRANDA RULE"; THE EIGHTH JUDICIAL DISTRICT COURT, LOST JURISDICTION TO EXERCISE AUTHORITY OVER PETITIONER AND DOCUMENTS WITHIN ITS TERRITORY, NO ISSUANCE OF DECREE SHOULD HAVE BEEN DESIDED PURSUANT TO "MIRANDA"; CONVICTION MUST BE CONSIDERED "VOID"; REMEMBER, COUNSELL WAS DENIED DURING THE TAKING OF PETITIONERS DNA DISREGARDED THE (PRIVACY INTEREST) OF THE ACCUSED YET; THE STATE OF NEVADA SATISFIED ITS (SELF-INTEREST) AND VIOLATED THE CIVIL RIGHTS OF THE PETITIONER.

THE PETITIONER HAVE EXHAUSTED ALL THREE HABEAS CORPUS TEST IN THE FOLLOWING: BOYD V. UNITED STATES, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). (CONVICTION REVERSED).

POWELL V. ALABAMA, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932) (JUDGMENT REVERSED).

JOHNSON V. ZERBST, 82 L.Ed 1461, 304 U.S. 458 (1938) (CONVICTION REVERSED).

///

1 CONSTITUTIONAL RIGHT

2 A PETITIONER HAS A RIGHT GUARANTEED BY A CONSTITUTION EITHER
3 OR FEDERAL OR STATE, A BASIC LIBERTY BY THE U.S. CONSTITUTION OR BILL OF
4 RIGHTS, SUCH AS THE FREEDOM OF SPEECH; HOWEVER, THE EIGHTH JUDICIAL
5 DISTRICT COURT FAILED IN THEIR OBLIGATIONS TO TRAIN ONE OF THEIR
6 SUBORDINATES TO RECOGNIZE AND FOLLOW "ESTABLISHED LAW", WHEN
7 HE FAILED TO ADDRESS DNA EVIDENCE TAKING OF MIRANDA V. ARIZONA,
8 (THE PRESENCE OF COUNSEL DURING ANY DNA TAKING), THE STATE OF
9 NEVADA PROSECUTOR VIOLATED MIRANDA V. ARIZONA, WHEN THE DIS-
10 TRICT ATTORNEY OFFICE FAILED TO TRAIN & INSTRUCT ONE OF THEIR
11 SUBORDINATES TO HONOR THE RIGHTS OF A CITIZEN AND ALLOW THE PRE-
12 SENCE OF PUBLIC DEFENDER, COUNSEL ---, TO BE NOTIFIED
13 AND PRESENT DURING THE TAKING OF PETITIONER'S DNA; THE TRIAL
14 JUDGE DID ERROR IN DENYING THE REQUEST OF THE PETITIONER'S MOTION
15 FOR DUE PROCESS OF PRESERVATION OF DNA - BUT ALLOWED THE PETI-
16 TIONER TO FACE EVIDENCE AGAINST HIMSELF WITHOUT JUSTIFICATION
17 OF THE SIXTH, FOURTH AND FOURTEENTH AMENDMENT; PETITIONER DO
18 DESERVE RELIEF FROM THIS SCENEFUL CRAFTY INTENTIONAL INJUSTICE
19 BY ALL THE ABOVE; LETS NOT FORGET THE DEFENSE COUNSEL WHOM WAS
20 APPOINTED BY THE EIGHTH DISTRICT COURT.

21 PETITIONER CAN NOT BE A WITNESS AGAINST HIMSELF, PENALTY OR
22 FORFEITURE IS EQUALLY WITHIN THE PROHIBITION OF THE FIFTH AMENDMENT.
23 BOTH AMENDMENTS RELATES TO THE PERSONAL SECURITY OF THE CITIZEN; THE
24 FOURTH AND FIFTH AMENDMENT PROTECTS THE COMPULSORY PRODUCTION
25 OF MIRANDA RULE AND CONSTITUTIONAL PROVISIONS FOR THE SECURITY
26 OF A CITIZEN'S RIGHTS. THE 8TH DIST AND DIST ATTORNEY VIOLATED MRS
27 176.09123 (3.) PETITIONER WAS A CONVICTED FELONY IN THE STATE OF
28 NEVADA BEFORE THE OBTAINING OF DNA.

1 JOHNSON v. ZERBST, 82 L.Ed. 1461, 304 U.S. 458 (1938):

2 "IF THE ACCUSED IS NOT REPRESENTED BY COUNSEL AND HAS NOT
3 COMPETENTLY AND INTELLIGENTLY WAIVED HIS CONSTITUTIONAL
4 RIGHT, THE SIXTH AMENDMENT STANDS AS A JURISDICTIONAL BAR
5 TO A VALID CONVICTION AND SENTENCE DEPRIVING HIM OF HIS
6 LIFE OR HIS LIBERTY. A COURT'S JURISDICTION AT THE BEGIN-
7 NING OF TRIAL MAY BE LOST "IN THE COURSE OF THE PROCEED-
8 INGS" DUE TO FAILURE TO COMPLETE THE COURT - AS THE SIXTH
9 AMENDMENT REQUIRES - BY PROVIDING COUNSEL FOR AN AC-
10 CUSED WHO IS UNABLE TO OBTAIN COUNSEL, WHO HAS NOT IN-
11 TELLIGENTLY WAIVED THIS CONSTITUTIONAL GUARANTEE, AND
12 WHOSE LIFE OR LIBERTY IS AT STAKE. IF THIS REQUIREMENT OF
13 THE SIXTH AMENDMENT IS NOT COMPLIED WITH, THE COURT NO
14 LONGER HAS JURISDICTION TO PROCEED. THE JUDGMENT OF
15 CONVICTION PRONOUNCED BY A COURT WITHOUT JURISDICT-
16 ION IS VOID, AND ONE IMPRISONED THEREUNDER MAY
17 OBTAIN 'RELEASE' BY HABEAS CORPUS." Id at 304 U.S. 468
18 469.

19 FACTS:

20 THE STATE OF NEVADA, PROSECUTING ATTORNEY PROCEEDED WITH A
21 "CONSCIOUS DISREGARD" FOR THE PROBABLE-CAUSE CONSEQUENCES OF A
22 WRONGFUL ACT AND A WILLFUL AND DELIBERATE FAILURE TO ACT TO AVOID
23 THOSE CONSEQUENCES. DISREGARDING NRS 42.001

24 THE PROVIDING ACTS OF STATES PROSECUTION COMMITTED: FRAUD,
25 MALICE, EXPRESSED OR IMPLIED, OPPRESSION:

26 - VIOLATING: NEVADA RULES OF PROFESSIONAL CONDUCT -

27 RULE 1.3 DILIGENCE:

28 RULE 3.3 CANDOR TOWARD THE TRIBUNAL:

1 RULE 3.8 SPECIAL RESPONSIBILITY OF A PROSECUTOR :

2 RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT :

3 NRS 47.240 CONCLUSIVE PRESUMPTIONS

4 NRS 48.015 RELEVANT EVIDENCE

5 NRS 48.035 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF
6 PREJUDICE, CONFUSION OR WASTE OF TIME,

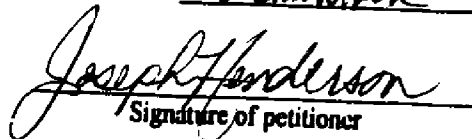
7 BY DISREGARDING THE FIRST DNA TEST RESULTS THE PROSECUTOR WAS
8 ABLE TO PREJUDICE PETITIONER TO A FAIR TRIAL BY CONFUSING THE JURY
9 WITH A SECOND DNA POSITIVE TEST RESULTS, PREVENTING PETITIONER
10 FROM CHALLENGING, "DUE TO THE STATE USING-UP ALL SAMPLES.

11 OBTAINING PETITIONERS DNA BY SEARCH WARRANT FROM THE MAGIS -
12 TRATE, WITHOUT INFORMING THAT MAGISTRATE THAT PETITIONER WAS IN THE
13 NEVADA CRIMINAL DATA BASE SINCE 2000. THE STATES PROSECUTOR ALSO;
14 FAILED TO MENTION THAT THEY RAN PETITIONER EVENT NUMBER, CRIME, AND
15 NOTIFICATION TO CENTRAL REPOSITORY OF NEVADA RECORDS OF CRIMINAL HIS-
16 TORY AND, DID NOT GET A POSITIVE RESULT BACK BUT HED THIS INFOR-
17 MATION FROM THE COURT; CAUSING; 1. FRAUD ON THE COURT; 2. INTRINSIC
18 FRAUD; 3. EXTRINSIC FRAUD; AND FRAUD. "PROOF IN THE RECORDS"

19 SO; SINCE PETITIONER NEVER WAIVED HIS CONSTITUTIONAL RIGHT
20 TO COUNSEL;^{STATE} AND MOVED FORWARD WITH A WARRANT TO FORCEFULLY
21 TAKE DNA WITHOUT COUNSEL PRESENT, RECEIVED THE 8TH DISTRICT
22 ITS JURISDICTION TO PROSECUTE. PETITIONER NEVER SIGNED CONSENT
23 TO THE STATE TO TAKE DNA. RIGHT NOW; PETITIONERS SENTENCE
24 IS IN "VAIN", UNLESS THE ABOVE IS SUBMITTED BY DOCUMENTS.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 10TH day of the month of NOVEMBER 2021 of the year 2011.


Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.


Petitioner

Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, JOSEPH A HENDERSON, hereby certify pursuant to N.R.C.P. 5(b), that on this 10th day of the month of NOVEMBER, of the year 2011, I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

Respondent prison or jail official

Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

District Attorney of County of Conviction

Address

Joseph Henderson
Signature of Petitioner

AFFIRMATION PURSUANT TO NRS 239B.030

I, Joseph A Henderson, NDOC# 67224

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE
ATTACHED DOCUMENT ENTITLED 2nd Amendment
HABUS CORPUS

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 10th DAY OF November, 2021.

SIGNATURE:

Joseph Henderson

INMATE PRINTED NAME:

Joseph A Henderson

INMATE NDOC #

67224

INMATE ADDRESS: ELY STATE PRISON

P. O. BOX 1989

ELY, NV 89301

EXHIBIT "A"

PRESENTENCE INVESTIGATION REPORT

NAMING: Ahud Yudia Chaziz AS A CO-DEFENDANT.

IN ANOTHER CASE NO. C229335 DEPT 21 ON
MARCH 16. 2009.

AUGUST 27. 2008. ISSUED

PRESENTENCE INVESTIGATION REPORT**JOSEPH ALEXANDER HENDERSON****CC#: C212968****Page 8**

Victim #1 began to fight with the other two suspects upstairs and was "pistol whipped" causing injuries to his scalp which bled profusely. Victim #2 was taken upstairs to the master bedroom by Mr. Henderson where he tied up the victim and sexually assaulted a second time with Mr. Henderson penetrating her vagina with his penis.

The suspects ransacked the home, taking cash and other items. Victim #2 freed herself and called 911.

VII. CO-DEFENDANT'S/OFFENDER'S INFORMATION

Ahud Yudja Chaziz is scheduled for trial under C229335, in Department XXI on March 16, 2009.

VIII. DEFENDANT'S STATEMENT

The defendant was interviewed at the Clark County Detention Center on July 30, 2008 and did not provide a written statement for the Court's review.

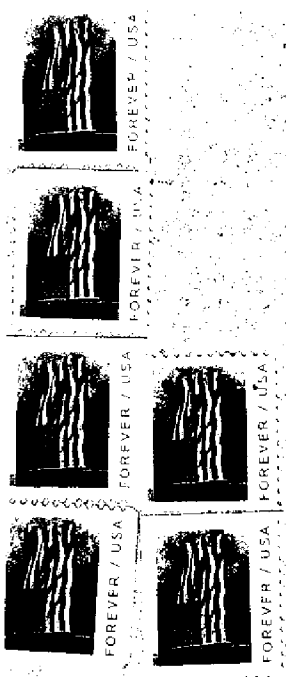
The defendant maintains his innocence in the instant offense and says he was not involved in the crime.

IX. VICTIM INFORMATION/STATEMENT

An information letter and claim form were mailed to both victims (VC2178712 and VC2178713) on July 22, 2008, however a claim has not been received. Telephone contact was made on August 12, 2008 with one victim and the impact forms were faxed. With no response, the undersigned telephoned both victims on August 15, 2008 and they offered the following impact statements:

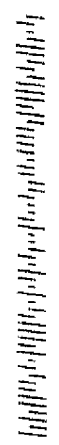
Victim #1 - (VC2178713) reported that he was affected emotionally, in his marriage, in his health and financially. He reported that the two victims were in the process of planning their wedding at the time of the instant offense and looked forward to having a large celebration and having children. Since the event, the two decided to elope and get married because they did not want to be the center of attention and have their guests dwell on how they were victimized. They have both decided to wait to have children because of the emotions that both continue to deal with due to the instant offense. The victim reports that he has gained 40 pounds, suffered depression, been diagnosed with diabetes and high blood pressure since the event. He believes this crime has taken 10 years off his life and asks who can ever pay for that time. Financially the victim reported that he sold the house where the event happened and had to disclose that it was the scene of a crime which caused him a \$50,000 loss in the transaction. In addition, he reported that he had planned to expand his practice significantly prior to the event and due to the event and the subsequent depression he suffered, abandoned the concept which could have developed into hundreds of thousands dollars of added income. He continually stated that the victim "tarnished" both the victims' lives with both victims constantly thinking who was "lurking around the next corner". The victim reported that he felt that his associates and patients still look at him as "that's the guy that got beat up and his wife got raped". He feels his manhood has been questioned by the event, even though he knows that he did everything possible to prevent it. He felt the defendant had the victims "cornered" and they easily could have been murdered. He described the defendant as a person with "no morals, no boundaries" and a "true predator" that could have taken the money and walked out but did not. He believes the defendant should be in front of a firing squad and in the least kept out of society. He said that 20 years is far too little as he fears the defendant would then be young enough to harm someone else. 50 years should be a minimum sentence.

Mr Henderson
P.O. Box 1989
Las Vegas, Nevada
89155



Mr Steven Grierson Clerk
Eight Judicial District Court
2200 Lewis Ave 2nd floor
Las Vegas, Nevada
89155

"Legal Mail"



1 JOSEPH HENDERSON
2 P.O. BOX 1989
3 ELY, NV 89301

FILED
DEC 03 2021
Ann L. Johnson
CLERK OF COURT

4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 NAME, JOSEPH HENDERSON,

9 Plaintiff(s),

10 -vs-

CASE NO.

11 NAME, WILLIAM GETTLE,

A21-840121-W

12 Defendant(s).

2

13 "SUCCESSIVE"
14 "SECOND AMENDED" PETITION
15 WRIT OF HABEAS CORPUS ON
16 NEWLY DISCOVERED EVIDENCE

17 COMES NOW JOSEPH HENDERSON, in PRO PER and herein above respectfully;

18 SUBMIT THIS SECOND AMENDED PETITION, ADDING (GROUND TWO)
19 PURSUANT TO NRS 34.724.

20 RESPECTFULLY YOURS

21 *Joseph Henderson*
22 * 6/2/24

23 The above is made and based on the following Memorandum of Points and Authorities.

24
25 RECEIVED
26 NOV 22 2021
27 CLERK OF THE COURT
28

CERTIFICATE OF SERVICE BY MAIL

Pursuant to NRCP Rule 5 (b), I hereby certify that I am the Petitioner/Defendant named herein
and that on this 10 day of NOV, 2021, I mailed a true and correct copy of this
foregoing SECOND AMENDED HABEAS CORPUS to the following:

DISTRICT ATTORNEY

200 LEWIS AVE

LV, NV 89155

8TH JUDICIAL DIST

200 LEWIS AVE

LV, NV 89101

BY: Joseph Henderson

AFFIRMATION

Pursuant to NRS 239b.030

The undersigned does hereby affirm that the preceding document, SECOND AMENDED

PETITION FOR WRIT OF HABEAS CORPUS, NEWLY DISCOVERED EVIDENCE
(Title of Document)

Filed in case number: A 21 840121 W

☒ Document does not contain the social security number of any person

Or

☐ Document contains the social security number of a person as required by:

☐ A Specific state or federal law, to wit

Or

☐ For the administration of a public program

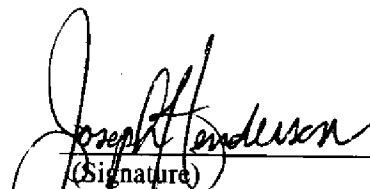
Or

☐ For an application for a federal or state grant

Or

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230, and NRS 125b.055)

DATE: 11-10-21


(Signature)

Joseph A. Henderson
(Print Name)

(Attorney for)

Heather L. Smith
CLERK OF THE COURT

Joseph A. Henderson

67224 / Pro Per
Ely State Prison
P.O. BOX 1989
ELY, NV 89301

IN THE Sixth JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

The State of Nevada

Plaintiff,

vs.

Joseph A. Henderson

Defendant

Case No.: A21-840121-W

Dept No.: II

Notice of Motion

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE, that

REQUEST FOR EVIDENTIARY
HEARING

will come on for hearing before the above-entitled Court on the _____ day of

_____, 20____, at the hour of _____ o'clock _____.m. in

Department _____, of said Court.

DATED this 10th day of November, 2021.

CLERK OF THE COURT

NOV 22 2021

RECEIVED

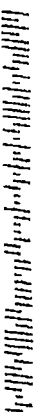
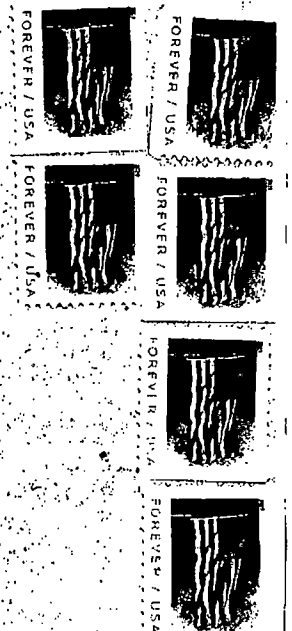
Joseph Henderson

_____ / Pro
Per
Ely State Prison
P.O. BOX 1989
ELY, NV 89301

Mrs Henderson Joseph
J. Henderson
89301
89301

Mrs Helen Emerson Clark
Eight Judicial District Court
200 Lewis Ave 2nd floor
Las Vegas, Nevada
89155

11
Legal Mail



FILED

DEC 20 2021

DISTRICT COURT
CLARK COUNTY, NEVADA

Elizabeth A. Brown
CLERK OF COURT

THE STATE OF NEVADA
PLAINTIFF

CASE NO. A 21-840121-W
DOCKET NO.

VS.

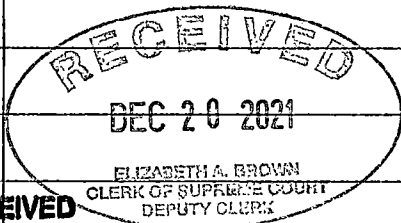
JOSEPH A HENDERSON
DEFENDENT

NOTICE OF APPEAL

COME NOW, THE DEFENDENT, JOSEPH A
HENDERSON, IN THIS INSTANT NOTICE OF APPEAL
OF THE ORDER OF CHIEF JUDGE DISMISSING
EJDC RULE 2.20 (B) SUSPENDING DEFENDENTS
REQUEST FOR AN EVIDENTIARY HEARING.

DATED THIS 13TH DAY OF DECEMBER 2021
RESPECTFULLY SUBMITTED

BY: *Joseph Henderson*
JOSEPH A HENDERSON
P.O. BOX 1989
ELY NEVADA
89301



RECEIVED
APPEALS

JAN - 5 2022

CLERK OF THE COURT

pg 1

A-21-840121-W
NOAS
Notice of Appeal
4978481



POINTS AND AUTHORITIES

PURSUANT TO: HAINS V. KERNER

404 U.S. 519 92 S.Ct. 594 30 LEd 2d 652

1972 U.S. LEXUS 99. "PRO SE COMPLAINTS WHICH WE HOLD TO LESS STRINGENT STANDARDS THAN FORMAL PLEADINGS DRAFTED BY LAWYERS"

ACCORDING TO N.R.S 174.165 RELIEF FROM PRESIDENTIAL JOINDER, 1,2

[SEVERANCE REQUIRED]

TO ENSURE FAIRNESS IN FUTURE CASES WHERE THE STATE SEEKS CONVICTIONS ON MULTIPLE COUNTS, INCLUDING A COUNT OF POSSESSION OF A FIREARM BY AN EX-FELON UNDER NRS 202.360 SEVERANCE OF THE EX-FELON IN POSSESSION OF A WEAPON CHARGE WILL BE REQUIRED. BROWN V. STATE 114 NEV. 118, 967 P. 2ND 1126 114 NEV. ADV REP. 121 1998 NEV.

PURSUANT TO THE 14TH AMENDMENT DUE PROCESS AND EQUAL PROTECTION. THE STATE OF NEVADA VIOLATED THESE CLAUSES BY THESE SET OF FACTS: "THE STATE HAD AWAY AHAD CHAZIZ CASE NO: C229335 IN DEPT 21 WHO WAS SUPPOSINGLY A CO-DEFENDENT, WITH A FIELD INFORMATION THAT WOULD OF RELIEVED - DEFENDENT OF ALL CHARGES..."

ACCORDING TO SEVERANCE AND JOINDER 174.165. TO CONSTITUTE GOOD CAUSE FOR A SEPARATE TRIAL IN ANY CASE THE EVIDENCE

PROPOSED TO BE INTRODUCED AS TO ONE MUST BE
INADMISSIBLE AS TO THE OTHER, AND OF SUCH
A NATURE AS TO AFFORD REASONABLE GROUND
FOR THE BELIEF THAT THE OTHER WILL BE PREJUDICE
BY A JOINT TRIAL; THE MERE FACT THAT
EVIDENCE ADMISSIBLE AGAINST ONE IS NOT
MATERIAL AS TO THE OTHER IS NOT, IN ITSELF
DEEMED SUFFICIENT GROUND FOR A SEPARATE
TRIAL, STATE V LEWIS 50 NEV 212, 255 P. 1002
1927 NEV LEXIS 15 (NEV 1927) (DECISION UNDER
FORMER SIMILAR STATUTE.)

IT CLEARLY PREJUDICE THE DEFENDENT
WHEN THE STATE PROSECUTOR HID AWAY MATERIAL
EVIDENCE THAT ESTABLISHED THE DEFENDENTS
INNOCENCE. [IF THE STATE WOULD HAVE
BEEN FORTHRIGHT ABOUT THIS SO CALLED CO-
DEPENDENT, WHO WAS PICKED OUT BY THE VICTIMS
IN THIS CASE, AND NEVER OFFERED ANY -
RELATIONSHIP TO THE DEFENDENT....

"CONCLUSION"

BRADY V MARYLAND: "THE DEFENDENTS CASE
THE SAME AS BRADY..." THE CHIEF JUDGE DO
NOT WANT TO HAVE A EVIDENTIARY HEARING
ON THIS CRUCIAL EVIDENCE AND THE FACTS THAT
AAUD CHAZIZ CASE NO. C 229335 AND THE DEFENDENT
JOSEPH ANDERSON NEVER EXPERIENCED

SEVERANCE AND JOINDER PURSUANT

TO 174.165

THIS IS THE REASON WHY THE CHIEF
JUDGE DONT WANT TO ALLOW THE DEFENDENT
A EVIDENTIARY HEARING. THE DEFENDENTS
REQUEST IS COLORFUL, FACTUAL AND
CONSTITUTIONAL "SUPPORTED BY
ESTABLISHED NEVADA REVISED STATUTE..."

CERTIFICATE OF SERVICE

PURSUANT TO NRCP RULE 5 (B) I HEREBY
CERTIFY THAT I AM THE PETITIONER / DEFEND
ENT NAMED HEREIN AND THAT ON THIS 13TH OF
DEC 2021 I MAILED A TRUE AND CORRECT
COPY OF THIS FOREGOING MOTION TO APPEAL
TO THE FOLLOWING:

DISTRICT COURT 8TH
200 LEWIS AVE
LV NV 89301

NEV SUPREME COURT
210 S CARSON ST
CARSON CITY N.V.
89701

By Joseph Henderson
Joseph Henderson 67224
P.O. BOX 1989
GIT NEVADA 89301

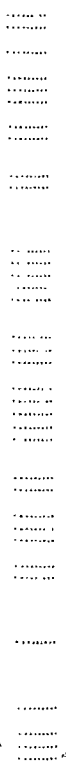
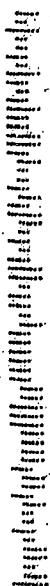
MR HENDERSON JESSIE
P.O. BOX 1989
ELY NEVADA
89301

LAS VEGAS NV 890
15 DEC 2021 PM 4 L



TO: SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S. CARSON STR SUITE 201
CARSON CITY NEVADA
89701

89701-878051



ELY STATE PRISON
DEC 14 2021

Heaven & Hume
CLERK OF THE COURT

No. A-21-840121-W

Dept. No. 2

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

Joseph A. Henderson

Petitioner/Plaintiff,

v.

STATE OF NEVADA

Respondent/Defendant.

REQUEST FOR SUBMISSION OF PLEADING

It is requested that the Pleading entitled MOTION FOR EXTENSION OF TIME

_____, which was submitted/filed on the
3rd day of DEC, 2021, in the above-entitled matter, be submitted to the Court for
it's consideration.

The undersigned Petitioner/Plaintiff, certifies that a copy of the pleading noted above and this
document, have been served upon the Respondent/Defendant.

Dated this 3rd day of December, 2021.

Joseph Henderson

Petitioner/Plaintiff
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

RECEIVED

DEC 13 2021

CLERK OF THE COURT

Heather A. Hemin
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JOSEPH A HENDERSON

PETITIONER

CASE NO: A-21-840121-W

VS.

DEPT-2

STATE OF NEVADA

RESPONDENT

MOTION FOR EXTENTION OF TIME

Come Now, Petitioner, JOSEPH HENDERSON
IN THIS INSTANT REQUEST FOR A 45 DAYS OF
EXTENTION OF TIME, UNTIL Feb 1ST 2022.

DATED THIS DEC 3rd 2021

RESPECTFULLY SUBMITTED

Joseph Henderson
P.O. BOX 1989
ELY NEVADA

89301

"CAUSE"

"TO HIRE COUNSEL TO REPRESENT PETITIONER"

///

///

///

///

///

///

AFFIRMATION PURSUANT TO NRS 239B.030

I, Joseph A Henderson, NDOC# 67224,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE
ATTACHED DOCUMENT ENTITLED MOTION FOR EXTENSION
OF Time.

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 3rd DAY OF Dec, 2021.

SIGNATURE:

Joseph Henderson

INMATE PRINTED NAME:

Joseph A Henderson

INMATE NDOC #

67224

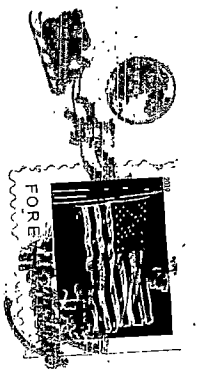
INMATE ADDRESS: ELY STATE PRISON

P. O. BOX 1989

ELY, NV 89301

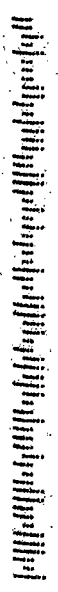
MR JOSE A HENDERSON *67344
P.O. BOX 1989
ELY NEVADA
89301

LAS VEGAS NV 890
7 DEC 2021 PM 3 L



STANTON D GRIERSON,
CLERK OF THE COURT
200 LEWIS AVE 3RD FLOOR
LAS VEGAS NV
89156-160

89101-630000



ELY STATE PRISON
DEC 0 9 2021



1 ASTA

2
3
4
5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 JOSEPH A. HENDERSON,

11 Plaintiff(s),

12 vs.

13 WARDEN WILLIAM GUTTERE,

14 Defendant(s),
15

Case No: A-21-840121-W

Dept No: II

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Joseph Henderson

20 2. Judge: Carli Kierny

21 3. Appellant(s): Joseph Henderson

22 Counsel:

23 Joseph Henderson #67224
24 P.O. Box 1989
Ely, NV 89301

25 4. Respondent (s): Warden William Guttere

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
8 ***Expires 1 year from date filed*
9 Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

10 9. Date Commenced in District Court: August 25, 2021

11 10. Brief Description of the Nature of the Action: Civil Writ

12 Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

13 11. Previous Appeal: No

14 Supreme Court Docket Number(s): N/A

15 12. Child Custody or Visitation: N/A

16 13. Possibility of Settlement: Unknown

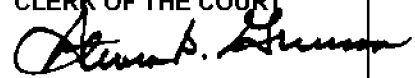
17 Dated This 5 day of January 2022.

18 Steven D. Grierson, Clerk of the Court

19
20 /s/ Heather Ungermann

21 Heather Ungermann, Deputy Clerk
22 200 Lewis Ave
23 PO Box 551601
24 Las Vegas, Nevada 89155-1601
(702) 671-0512

25 cc: Joseph Henderson
26
27
28



RSPN
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 ALEXANDER HENDERSON,
#1502730

Defendant.

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

DEPT NO: II

**STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION) SECOND AMENDED PETITION SUCCESSIVE
NEWLY DISCOVERED EVIDENCE, MEMORANDUM IN SUPPORT OF
"SUCCESSIVE" WRIT OF HABEAS CORPUS (NEWLY DISCOVERED
EVIDENCE), REQUEST FOR EVIDENTIARY HEARING; and MOTION
TO DISMISS PURSUANT TO THE DOCTRINE OF LACHES**

DATE OF HEARING: FEBRUARY 15, 2022
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in this State's Response to Defendant's Petition for Writ Of Habeas Corpus (Post-Conviction) Second Amended Petition Successive Newly Discovered Evidence, Memorandum in Support of "Successive" Writ of Habeas Corpus (Newly Discovered Evidence), and Request for Evidentiary Hearing.

This Response is based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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 – 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

1 and consecutive term of seventy-two months to one hundred eighty months for the Use of a
2 Deadly Weapon, to run concurrent with Count 10; Count 12 – seventy-two months to one
3 hundred eighty months in the NDOC, plus an equal and consecutive term of seventy-two
4 months to one hundred eighty months for the Use of a Deadly Weapon, to run consecutive to
5 Count 11; Count 13 – twelve months in the Clark County Detention Center, to run concurrent
6 with Count 12; and Count 14 – sixty-two months to one hundred fifty-six months in the NDOC,
7 to run consecutive to Count 13. Petitioner received 1,251 days credit for time served. A special
8 sentence of lifetime supervision was imposed to commence upon release from any term of
9 imprisonment, probation or parole.

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

13 Petitioner filed his pro per Petition for Writ of Habeas Corpus (Post-Conviction) on
14 January 11, 2011. Through counsel, Petitioner filed a supplemental petition on August 26,
15 2011. After an evidentiary hearing, the district court denied the petition on October 22, 2012.
16 The Findings of Fact, Conclusions of Law, and Order were filed on November 21, 2012.
17 Petitioner filed a Notice of Appeal on February 12, 2013. The Nevada Supreme Court affirmed
18 the denial of the writ on September 18, 2014. Remittitur issued on October 20, 2014.

19 Petitioner filed a pro per “Successive” Petition for Writ of Habeas Corpus on June 12,
20 2014. The district court denied this Successive Petition on December 2, 2014. Petitioner filed
21 a Notice of Appeal on December 11, 2014. The Nevada Supreme Court affirmed the denial of
22 the writ on September 11, 2015. Remittitur issued October 12, 2015.

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

1 Corpus (Post-Conviction) Second Amended Petition Successive Newly Discovered Evidence
2 (hereinafter “12/2/21 Petition”). On December 23, 2021, Petitioner filed a Motion for
3 Extension of Time, asking for an additional 45 days so he may hire an attorney. These filings
4 will be referred to collectively as the “Successive Petition.” The State responds as follows.

5 **STATEMENT OF THE FACTS**

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

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

22 The olive-skinned man demanded to know where Eric kept the safe. Eric told them that
23 he did not have a safe. In an attempt to appease the intruders, Eric gave them approximately a
24 thousand dollars in cash he had hidden in a closet. While the intruders were occupied, Eric
25 was able to get out of his handcuffs. He attempted to get downstairs, but was caught by one of
26 the masked intruders. While scuffling with one of the intruders, Eric was pistol-whipped two
27 or three times, which split his head open. Eventually, the intruders tied Eric up with electrical
28 cords and left him to bleed on the floor.

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

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

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

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

24 LVMPD Detective Michael Jefferies obtained a search warrant for a buccal swab from
25 Petitioner, to confirm the DNA match was true and correct. In March 2005, LVMPD forensic
26 scientist Kathy M. Guenther ("Guenther"), using the unknown male profile created by Welch
27 and the profile created from Petitioner's buccal swab, discovered a positive match or positive
28 comparison with Petitioner's DNA on all 13 locations used by LVMPD forensic scientist to

1 match DNA at the time. Under the statistical threshold set in the LVMPD laboratory, the
2 chances of a random selective sample to have the same profile was six hundred billion
3 (6,000,000,000) to one (1). Because six hundred billion is hundred times the earth's population
4 at the time, under laboratory standards identity is assumed. In March of 2005, Petitioner was
5 officially confirmed as the source of the foreign DNA material taken from Julie Kim body, at
6 which time he was arrested.

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

17 **ARGUMENT**

18 **I. THE PETITION IS PROCEDURALLY BARRED**

19 As the creative titles of the filings within this Successive Petition suggest, they are
20 untimely, successive, and an abuse of the writ. Petitioner fails to demonstrate good cause or
21 sufficient prejudice to permit him to evade the procedural bars. There are no facts which, if
22 true, would entitle Petitioner to relief, so no evidentiary hearing is required.

23 **A. The Petition is time-barred.**

24 The Petition is time-barred pursuant to NRS 34.726(1):

25 Unless there is good cause shown for delay, a petition that challenges
26 the validity of a judgment or sentence must be filed within 1 year of
27 the entry of the judgment of conviction or, if an appeal has been taken
28 from the judgment, within 1 year after the Supreme Court issues its
remititur. For the purposes of this subsection, good cause for delay
exists if the petitioner demonstrates to the satisfaction of the court:

//

- 1 (a) That the delay is not the fault of the petitioner; and
2 (b) That dismissal of the petition as untimely will unduly
3 prejudice the petitioner.

4 “[T]he Legislature has determined that one year provides sufficient time within which
5 to raise claims that trial and appellate counsel provided ineffective assistance.” Rippo v. State,
6 134 Nev. 411, 421, 423 P.3d 1084, 1097, amended on denial of reh'g, 432 P.3d 167 (Nev.
7 2018). The one-year time limit for preparing petitions for post-conviction relief under NRS
8 34.726 is strictly applied because the “procedural default rules ... are supposed to discourage
9 the perpetual filing of habeas petitions.” Rippo at 423, 423 P.3d at 1096.

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

15 The one-year time limit for preparing petitions for post-conviction relief under NRS
16 34.726 is strictly construed. In Gonzales v. State, the Nevada Supreme Court rejected a habeas
17 petition filed two days late despite evidence presented by the defendant that he purchased
18 postage through the prison and mailed the petition within the one-year time limit. 118 Nev.
19 590, 596, 53 P.3d 901, 904 (2002). In contrast with the short amount of time to file a notice of
20 appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no
21 injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the
22 postal system. Id. at 595, 53 P.3d at 903.

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

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

2 Second or successive petitions include those that allege new or different grounds but a
3 judge or justice finds that the petitioner's failure to assert those grounds in a prior petition
4 would constitute an abuse of the writ. The Successive Petition is an abuse of the writ.

5 NRS 34.810(2) reads:

6 A second or successive petition must be dismissed if the judge or
7 justice determines that it fails to allege new or different grounds for
8 relief and that the prior determination was on the merits or, if new and
9 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.

10 Second or successive petitions will only be decided on the merits if the petitioner can
11 show good cause and prejudice. NRS 34.810(3). The burden of proving specific facts that
12 show good cause for his failure to raise his claims earlier falls on the petitioner. NRS
13 34.810(3). Petitioner must also show actual prejudice. NRS 34.810(3).

14 The Nevada Supreme Court has stated: "Without such limitations on the availability of
15 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-
16 conviction remedies. In addition, meritless, successive and untimely petitions clog the court
17 system and undermine the finality of convictions." Lozada v. State, 110 Nev. 349, 358, 871
18 P.2d 944, 950 (1994).

19 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly
20 require a careful review of the record, successive petitions may be dismissed based solely on
21 the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In
22 other words, if the claim or allegation was previously available with reasonable diligence, it is
23 an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,
24 497-98 (1991).

25 Petitioner has previously litigated two petitions for writ of habeas corpus. To the extent
26 Petitioner raises new or different claims from those raised before, the Petition is an abuse of
27 the writ. NRS 34.810(2). Petitioner himself recognizes his abuse of the writ, as the filings that
28 comprise the instant Petition are actually and correctly titled "successive." The "newly-

1 discovered” evidence cited in the Petition has been in Petitioner’s possession since 2008. To
2 raise these claims now is abusive, as his claims could have been raised in his appeal or in his
3 first or second habeas petitions. NRS 34.810.

4 **C. These Claims Are Waived**

5 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
6 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
7 conviction proceedings. . . . [A]ll other claims that are appropriate for a direct appeal must be
8 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*”
9 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
10 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). NRS
11 34.810(1)(b)(2) states “The court shall dismiss a petition if the court determines that ... the
12 petitioner’s conviction was the result of a trial and the grounds for the petition could have been
13 ... raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction
14 relief.”

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

19 Petitioner was clearly aware of the PSI prepared in 2008, as his attorney, in his presence,
20 referred to the PSI during the sentencing hearing on August 28, 2008. See generally Reporter’s
21 Transcript of Sentencing, filed November 7, 2008. “I just wanted to point out there is an error
22 on the PSI report, but my client would still like to go forward today with sentencing.” Id. at 2.
23 His attorney also acknowledged receiving a supplemental PSI that corrected Petitioner’s
24 asserted error. Id. at 12. Petitioner’s attorney affirmed to the Court that she provided both PSI
25 reports to Petitioner. Id. at 13.

26 Rather than assert the confession of his co-defendant meant Petitioner could not also
27 have been a participant, as he does here, Petitioner argued at sentencing that “The police
28 framed me. I mean, either the police, somebody had to frame me. I was framed.” Id. at 8.

1 Petitioner's attorney, rather than arguing that her client could not have been the man who left
2 his DNA on the victim, merely urged the Court to "not be persuaded by this one victim's
3 experience." Id. at 11-12. As miserable as being raped at gunpoint while her fiancé was pistol-
4 whipped and her home invaded must have been for the victim, Petitioner's attorney claimed
5 "it certainly could have been worse." Id. The attorney did not, however, assert the co-
6 defendant's very existence exonerated her client.

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

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

24 **D. Application of the procedural bars is mandatory.**

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

1 is mandatory,” noting:

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

5 Id. Additionally, the Court noted that procedural bars “cannot be ignored [by the district court]
6 when properly raised by the State.” Id. at 233, 112 P.3d at 1075. Ignoring these procedural
7 bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The
8 Nevada Supreme Court has granted no discretion to the district courts regarding whether to
9 apply the statutory procedural bars; the rules *must* be applied.

10 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
11 There the Court ruled that the defendant’s petition was “untimely, successive, and an abuse of
12 the writ” and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
13 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant’s
14 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
15 procedural bars are so fundamental to the post-conviction process that they must be applied
16 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.
17 Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev.
18 173, 180-81, 69 P.3d 676, 681-82 (2003).

19 **II. THE PETITION FAILS TO DEMONSTRATE GOOD CAUSE OR ACTUAL** 20 **PREJUDICE**

21 To avoid procedural default, a defendant has the burden of pleading and proving
22 specific facts that demonstrate good cause for his failure to present his claim in earlier
23 proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly
24 prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952,
25 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104 Nev. 656, 659,
26 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a habeas petition if it presents claims that
27 either were or could have been presented in an earlier proceeding, unless the court finds both
28 cause for failing to present the claims earlier or for raising them again and actual prejudice to

1 the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis
2 added). Petitioner has failed to demonstrate good cause or actual prejudice.

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

4 “To establish good cause, appellants must show that an impediment external to the
5 defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119
6 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
7 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external
8 impediment could be “that the factual or legal basis for a claim was not reasonably available
9 to counsel, or that ‘some interference by officials’ made compliance impracticable.”
10 Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
11 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
12 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition
13 must not be the fault of the petitioner. NRS 34.726(1)(a).

14 The Nevada Supreme Court has clarified that a defendant cannot attempt to
15 manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there
16 must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71
17 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the
18 lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel
19 to forward a copy of the file to a petitioner have been found not to constitute good cause. See
20 Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as
21 recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State,
22 111 Nev. 335, 890 P.2d 797 (1995).

23 A petitioner raising good cause to excuse procedural bars must do so within a
24 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34
25 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
26 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably
27 available to the petitioner during the statutory time period did not constitute good cause to
28 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good

1 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,
2 453 120 S. Ct. 1587, 1592 (2000).

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

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

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

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

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

2 Petitioner alleges he has presented a claim of actual innocence, based upon newly
3 discovered evidence, due to his review of his Presentence Investigation Report that was
4 prepared in 2008. 8/25/21 Petition, at 8. When a petitioner cannot demonstrate good cause, the
5 court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to
6 consider the petition would result in a fundamental miscarriage of justice. Pellegrini v.
7 State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To demonstrate prejudice, a defendant
8 must show “not merely that the errors of [the proceeding] created possibility of prejudice, but
9 that they worked to his actual and substantial disadvantage, in affecting the state proceedings
10 with error of constitutional dimensions.” Hogan v Warden, 109 Nev. at 960, 860 P.2d at 716
11 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

12 “The conviction of a petitioner who was actually innocent would be a fundamental
13 miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive
14 petition.” Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006). However, “actual
15 innocence means factual innocence, not mere legal insufficiency.” Mitchell, 122 Nev. at
16 1273–74, 149 P.3d at 36 (quoting Bousley v. United States, 523 U.S. 614, 623-24, 118 S.Ct.
17 1604 (1998)). A fundamental miscarriage of justice requires “a colorable showing” that the
18 petitioner is “actually innocent of the crime.” Pellegrini, 117 Nev. at 887, 34 P.3d at 537. This
19 requires that the petitioner present *new* evidence of his innocence. See, e.g., House v. Bell, 547
20 U.S. 518, 537, 126 S.Ct. 2064, 2077 (2006) (“a gateway claim requires ‘new reliable
21 evidence—whether it is exculpatory scientific evidence, trustworthy eyewitness accounts, or
22 critical physical evidence—that was not presented at trial.’” (quoting Schlup v. Delo, 513 U.S.
23 298, 324, 115 S.Ct. 851, 865 (1995))). “Without any new evidence of innocence, even the
24 existence of a concededly meritorious constitutional violation is not in itself sufficient to
25 establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred
26 claim.” Schlup, 513 U.S. at 316, 115 S.Ct. at 861.

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

6 **1. Ahud Chaziz' guilty plea**

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

16 The facts presented at trial and in the charging information show three men conspired
17 to commit the crimes. See Information filed July 11, 2005. Petitioner wholly fails to
18 demonstrate that the guilt of Mr. Chaziz as one of the three men in any way demonstrates
19 Petitioner's innocence of being another of the men. He also fails to demonstrate the State
20 committed any constitutional violation regarding Mr. Chaziz's existence, as his existence was
21 known to Petitioner and was not exculpatory. DNA evidence from Petitioner, not from Mr.
22 Chaziz, was found on the victim's vagina, on her breasts, and on her bedsheets. Therefore,
23 Petitioner cannot show prejudice.

24 **2. Joinder and severance**

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

28

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

1 2012, at 151.

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

10 Id.

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

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

27 Petitioner's claim that his "right" to severance was compromised because the two
28 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

1 to establish probable cause to suspect that a crime has been committed and that the Petitioner
2 committed it.” Id.

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

8 NRS 174.165 discusses severance, not mandatory joinder. Petitioner cites no authority
9 showing two defendants who commit a crime together must be tried together. This is fatal to
10 his claim that he had a right to be tried with Mr. Chaziz. A party seeking review bears the
11 responsibility “to cogently argue, and present relevant authority” to support his assertions.
12 Edwards v. Emperor’s Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38
13 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d
14 80, 83 (1991) (defendant’s failure to present legal authority resulted in no reason for the district
15 court to consider defendant’s claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987)
16 (an arguing party must support his arguments with relevant authority and cogent argument;
17 “issues not so presented need not be addressed”); Randall v. Salvation Army, 100 Nev. 466,
18 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation
19 to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d
20 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the
21 merits).

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

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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. The State would also like to point out swabbing a cheek is not an interrogation under Miranda.

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

III. The State affirmatively pleads laches

The instant Successive Petition must also be 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.

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

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

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

20 **IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

21 Petitioner requests an evidentiary hearing to resolve his Petition. Request at 1. He
22 alleges a hearing is necessary so the State can “explain away” the serious deprivation of
23 Petitioner’s rights, which occurred when the State “willfully and knowingly hid out Ahud Y.
24 Chaziz” for years. Request at 3. He wants an evidentiary hearing to see if “the state’s
25 prosecutor did in fact cause a miscarriage of justice by not following joinder of offenses of
26 two co-defendants and failing to file severance pursuant to NRS 174.165.” Memorandum at
27 13.

28 //

1 Since Mr. Chaziz is identified in the Presentence Investigation Report filed on August
2 27, 2008, a hearing is not required to expand the record. See Petitioner's Exhibit A. All that
3 could be learned from an evidentiary hearing is that Petitioner failed to read his court
4 documents during the intervening fourteen years.

5 The Nevada Supreme Court has held that if a petition can be resolved without
6 expanding the record, no evidentiary hearing is necessary. NRS 34.770; Marshall v. State, 110
7 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).
8 A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
9 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
10 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at
11 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled
12 to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is
13 'belied' when it is contradicted or proven to be false by the record as it existed at the time the
14 claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

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

20 1. The judge or justice, upon review of the return, answer and all
21 supporting documents which are filed, shall determine whether an
22 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.

23 2. If the judge or justice determines that the petitioner is not entitled
24 to relief and an evidentiary hearing is not required, he shall dismiss
the petition without a hearing.

25 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.

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

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

17 CONCLUSION

18 For the foregoing reasons, the State respectfully requests the filings in the instant
19 Petition be DENIED.

20 DATED this 7th day of January, 2022.

21 Respectfully submitted,

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

23
24 BY /s/ Karen Mishler
25 KAREN MISHLER
Chief Deputy District Attorney
26 Nevada Bar #013730
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that service of the above and foregoing was made this 7th day of
3 JANUARY 2022, to:

4 JOSEPH ANDERSON, BAC#67224
5 ELY STATE PRISON
6 P.O. BOX 1989
7 ELY, NV 89301

8 BY /s/ Howard Conrad
9 Secretary for the District Attorney's Office
10 Special Victims Unit
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28 hjc/SVU

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

Supreme Court No. 84046
District Court Case No. A840121; ~~0212900~~

FILED

FEB 23 2022

Elizabeth A. Brown
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDERS this appeal DISMISSED."

Judgment, as quoted above, entered this 28th day of January, 2022.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this February 22, 2022.

Elizabeth A. Brown, Supreme Court Clerk

By: Andrew Lococo
Deputy Clerk

A-21-840121-W
CCJD
NV Supreme Court Clerks Certificate/Judgn
4983362



IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

No. 84046

FILED

JAN 28 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK


ORDER DISMISSING APPEAL


This is a pro se appeal from a purported district court order dismissing a request for evidentiary hearing. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Because no statute or court rule provides for an appeal from an order dismissing a request for evidentiary hearing, this court lacks jurisdiction to consider this appeal. *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) (explaining that court has jurisdiction only when statute or court rule provides for appeal). To the extent that appellant's appeal is in regard to the postconviction petition for a writ of habeas corpus filed in district court August 25, 2021, no decision has been made on that petition. See NRS 177.015(3) (stating that appellant may appeal from a final judgment or verdict). Accordingly, this court

ORDERS this appeal DISMISSED.

 J.
Silver

 J.
Cadish

 J.
Pickering

SUPREME COURT
OF
NEVADA

(D) 1947A 

22-02873

cc: Hon. Carli Lynn Kierny, District Judge
Joseph Alexander Henderson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

Supreme Court No. 84046
District Court Case No. A840121; ~~C212968~~

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: February 22, 2022

Elizabeth A. Brown, Clerk of Court

By: Andrew Lococo
Deputy Clerk

cc (without enclosures):

Joseph Alexander Henderson
Clark County District Attorney \ Alexander G. Chen
Hon. Carli Lynn Kierny, District Judge

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on FEB 23 2022

Deputy HEATHER UNGERMANN
District Court Clerk

**RECEIVED
APPEALS**

FEB 23 2022

CLERK OF THE COURT

Heather S. Smith

CLERK OF THE COURT

1 NOH

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5
6 JOSEPH HENDERSON, et., al.,

Case No.: A-21-840121-W

Department 1

7 vs.

8
9 WARDEN WILLIAM GUTTERE, et., al.,

10
11 **NOTICE OF HEARING**

12 PLEASE TAKE NOTICE that there is a hearing scheduled for a **STATUS CHECK:**
13 **SETTING OF HEARING** scheduled on **July 26, 2022, at 9:00 a.m.** in District Court
14 Department 1.

15 Counsel are required to appear.

16 Dated this 11th day of July, 2022

17 *Bita Yeager*

18
19 **18B 013 1881 FC58**
Bita Yeager
District Court Judge

1 **CSERV**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

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6	Joseph Henderson, Plaintiff(s)
7	vs.
8	Warden William Guttere,
9	Defendant(s)

CASE NO: A-21-840121-W

DEPT. NO. Department 1

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11 **AUTOMATED CERTIFICATE OF SERVICE**

12 Electronic service was attempted through the Eighth Judicial District Court's
13 electronic filing system, but there were no registered users on the case.

14 If indicated below, a copy of the above mentioned filings were also served by mail
15 via United States Postal Service, postage prepaid, to the parties listed below at their last
16 known addresses on 7/12/2022

17	Joseph Henderson	#67224
18		ESP
19		P.O. Box 1989
20		Ely, NV, 89301

21	Steven Wolfson	Clark County District Attorney
22		200 Lewis Avenue, 3rd Floor
23		Las Vegas, NV, 89155

Heather S. Hume

CLERK OF THE COURT

OPI
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STACEY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391
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 ALEXANDER HENDERSON,
#1502730

Defendant.

CASE NO. **A-21-840121-W**
05C212968

DEPT NO. **I**

ORDER FOR PRODUCTION OF INMATE

JOSEPH ALEXANDER HENDERSON, BAC #67224

DATE OF HEARING: **AUGUST 25, 2022**
TIME OF HEARING: **9:00 AM**

TO: NEVADA DEPARTMENT OF CORRECTIONS; and

TO: JOSEPH LOMBARDO, Sheriff of Clark County, Nevada:

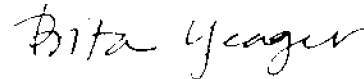
Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, District Attorney, through STACEY KOLLINS, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that NEVADA DEPARTMENT OF CORRECTIONS shall be, and is, hereby directed to produce JOSEPH ALEXANDER HENDERSON, Defendant in Case Number A-21-840121-W / 05C212968, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said JOSEPH ALEXANDER HENDERSON is currently incarcerated in the NEVADA DEPARTMENT OF CORRECTIONS located in

1 Clark County, Nevada, and his presence will be required in Las Vegas, Nevada, commencing
2 on AUGUST 25, 2022, at the hour of 9:00 o'clock AM and continuing until completion of the
3 prosecution's case against the said Defendant.

4 **IT IS FURTHER ORDERED** that JOSEPH LOMBARDO, Sheriff of Clark County,
5 Nevada, shall accept and retain custody of the said JOSEPH ALEXANDER HENDERSON
6 in the Clark County Detention Center, Las Vegas, Nevada, pending completion of said matter
7 in Clark County, or until the further Order of this Court; or in the alternative shall make all
8 arrangements for the transportation of the said JOSEPH ALEXANDER HENDERSON to and
9 from the Nevada Department of Corrections facility which are necessary to insure the JOSEPH
10 ALEXANDER HENDERSON's appearance in Clark County pending completion of said
11 matter, or until further Order of this Court.

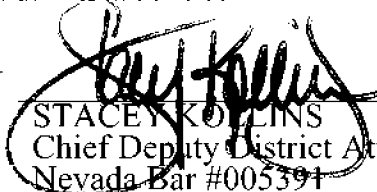
12 Dated this 28th day of July, 2022

13 

14
15 899 C9E A233 BAC3
Bita Yeager
District Court Judge

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

18 BY

19 
20 STACEY KOHLINS
Chief Deputy District Attorney
Nevada Bar #005391

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1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
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6 Joseph Henderson, Plaintiff(s)

CASE NO: A-21-840121-W

7 vs.

DEPT. NO. Department 1

8 Warden William Guttere,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 Electronic service was attempted through the Eighth Judicial District Court's
13 electronic filing system, but there were no registered users on the case. The filer has been
14 notified to serve all parties by traditional means.
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Heather S. Smith
CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISILLER
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 –

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

8 On August 28, 2008, Petitioner was sentenced as follows: Count 1 – twelve months in
9 the Clark County Detention Center; Count 2 – sixty-two months to one hundred fifty-six
10 months in the Nevada Department of Corrections (“NDOC”), to run concurrent with Count 1;
11 Count 3 – twenty-four months to sixty months in the NDOC, to run consecutive to Count 2;
12 Count 4 – sixty months to life in the NDOC, plus an equal and consecutive term of sixty
13 months to life for the Use of a Deadly Weapon, to run consecutive to Count 3; Count 5 – sixty
14 months to life in the NDOC, plus an equal and consecutive term of sixty months to life for the
15 Use of a Deadly Weapon, to run consecutive to Count 4; Count 6 – twenty-four months to
16 sixty months in the NDOC, to run consecutive to Count 5; Count 7 – one hundred twenty
17 months to life in the NDOC, plus an equal and consecutive term of one hundred twenty months
18 to life for the Use of a Deadly Weapon, to run Concurrent with Count 6; Count 8 – one hundred
19 twenty months to life in the NDOC, plus an equal and consecutive term of one hundred twenty
20 months to life for the Use of a Deadly Weapon, to run Consecutive to Count 7; Count 9 – one
21 hundred twenty months to life in the NDOC, plus an equal and consecutive term of one
22 hundred twenty months to life for the Use of a Deadly Weapon, to run Consecutive to Count
23 8; Count 10 – twenty-four months to sixty months in the NDOC, to run consecutive to Count
24 9; Count 11 – seventy-two months to one hundred eighty months in the NDOC, plus an equal
25 and consecutive term of seventy-two months to one hundred eighty months for the Use of a
26 Deadly Weapon, to run concurrent with Count 10; Count 12 – seventy-two months to one
27 hundred eighty months in the NDOC, plus an equal and consecutive term of seventy-two
28

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

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

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

16 Petitioner filed a pro per “Successive” Petition for Writ of Habeas Corpus on June 12,
17 2014. The district court denied this Successive Petition on December 2, 2014. Petitioner filed
18 a Notice of Appeal on December 11, 2014. The Nevada Supreme Court affirmed the denial of
19 the writ on September 11, 2015. Remittitur issued October 12, 2015.

20 On August 25, 2021, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
21 Conviction) “Successive” “Newly Discovered Evidence” (hereinafter “8/25/21 Petition”), a
22 Memorandum in Support of “Successive” Writ of Habeas Corpus Petition (Newly Discovered
23 Evidence) (hereinafter “Memorandum”), and an Affidavit/Declaration requesting this Court
24 refrain from appointing him counsel. On October 11, 2021, he filed a Request for Evidentiary
25 Hearing (hereinafter “Request”). On December 3, 2021, he filed a Petition for Writ of Habeas
26 Corpus (Post-Conviction) Second Amended Petition Successive Newly Discovered Evidence
27 (hereinafter “12/2/21 Petition”). On December 23, 2021, Petitioner filed a Motion for
28

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

5 FACTUAL HISTORY

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

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

22 The olive-skinned man demanded to know where Eric kept the safe. Eric told them that
23 he did not have a safe. In an attempt to appease the intruders, Eric gave them approximately a
24 thousand dollars in cash he had hidden in a closet. While the intruders were occupied, Eric
25 was able to get out of his handcuffs. He attempted to get downstairs, but was caught by one of
26 the masked intruders. While scuffling with one of the intruders, Eric was pistol-whipped two
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1 or three times, which split his head open. Eventually, the intruders tied Eric up with electrical
2 cords and left him to bleed on the floor.

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

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

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

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

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

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

20 **ANALYSIS**

21 **I. THE PETITION IS PROCEDURALLY BARRED**

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

26 **A. The Petition is time-barred.**

1 The Petition is time-barred pursuant to NRS 34.726(1):

2 Unless there is good cause shown for delay, a petition that challenges the
3 validity of a judgment or sentence must be filed within 1 year of the entry
4 of the judgment of conviction or, if an appeal has been taken from the
5 judgment, within 1 year after the Supreme Court issues its remittitur. For
6 the purposes of this subsection, good cause for delay exists if the petitioner
7 demonstrates to the satisfaction of the court:

- 8 (a) That the delay is not the fault of the petitioner; and
9 (b) That dismissal of the petition as untimely will unduly prejudice
10 the petitioner.

11 “[T]he Legislature has determined that one year provides sufficient time within which
12 to raise claims that trial and appellate counsel provided ineffective assistance.” Rippo v. State,
13 134 Nev. 411, 421, 423 P.3d 1084, 1097, amended on denial of reh'g, 432 P.3d 167 (Nev.
14 2018). The one-year time limit for preparing petitions for post-conviction relief under NRS
15 34.726 is strictly applied because the “procedural default rules ... are supposed to discourage
16 the perpetual filing of habeas petitions.” Rippo at 423, 423 P.3d at 1096.

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

22 The one-year time limit for preparing petitions for post-conviction relief under NRS
23 34.726 is strictly construed. In Gonzales v. State, the Nevada Supreme Court rejected a habeas
24 petition filed two days late despite evidence presented by the defendant that he purchased
25 postage through the prison and mailed the petition within the one-year time limit. 118 Nev.
26 590, 596, 53 P.3d 901, 904 (2002). In contrast with the short amount of time to file a notice of
27 appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no
28 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.

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

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

6 Second or successive petitions include those that allege new or different grounds but a
7 judge or justice finds that the petitioner's failure to assert those grounds in a prior petition
8 would constitute an abuse of the writ. The Successive Petition is an abuse of the writ.

9 NRS 34.810(2) reads:

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

15 Second or successive petitions will only be decided on the merits if the petitioner can
16 show good cause and prejudice. NRS 34.810(3). The burden of proving specific facts that
17 show good cause for his failure to raise his claims earlier falls on the petitioner. NRS
18 34.810(3). Petitioner must also show actual prejudice. NRS 34.810(3).

19 The Nevada Supreme Court has stated: "Without such limitations on the availability of
20 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-
21 conviction remedies. In addition, meritless, successive and untimely petitions clog the court
22 system and undermine the finality of convictions." Lozada v. State, 110 Nev. 349, 358, 871
23 P.2d 944, 950 (1994).

24 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly
25 require a careful review of the record, successive petitions may be dismissed based solely on
26 the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In
27 other words, if the claim or allegation was previously available with reasonable diligence, it is
28 an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,
497-98 (1991).

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

8 **C. These Claims Are Waived**

9 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
10 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
11 conviction proceedings. . . . [A]ll other claims that are appropriate for a direct appeal must be
12 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*”
13 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
14 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). NRS
15 34.810(1)(b)(2) states “The court shall dismiss a petition if the court determines that . . . the
16 petitioner’s conviction was the result of a trial and the grounds for the petition could have been
17 . . . raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction
18 relief.”

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

23 Petitioner was clearly aware of the PSI prepared in 2008, as his attorney, in his presence,
24 referred to the PSI during the sentencing hearing on August 28, 2008. See generally Reporter’s
25 Transcript of Sentencing, filed November 7, 2008. “I just wanted to point out there is an error
26 on the PSI report, but my client would still like to go forward today with sentencing.” Id. at 2.
27 His attorney also acknowledged receiving a supplemental PSI that corrected Petitioner’s
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1 asserted error. Id. at 12. Petitioner's attorney affirmed to the Court that she provided both PSI
2 reports to Petitioner. Id. at 13.

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

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

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

3 **D. Application of the procedural bars is mandatory.**

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

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

13 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
14 when properly raised by the State." Id. at 233, 112 P.3d at 1075. Ignoring these procedural
15 bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The
16 Nevada Supreme Court has granted no discretion to the district courts regarding whether to
17 apply the statutory procedural bars; the rules *must* be applied.

18 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
19 There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of
20 the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
21 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's
22 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
23 procedural bars are so fundamental to the post-conviction process that they must be applied
24 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.
25 Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev.
26 173, 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

1 lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel
2 to forward a copy of the file to a petitioner have been found not to constitute good cause. See
3 Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as
4 recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State,
5 111 Nev. 335, 890 P.2d 797 (1995).

6 A petitioner raising good cause to excuse procedural bars must do so within a
7 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34
8 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
9 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably
10 available to the petitioner during the statutory time period did not constitute good cause to
11 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
12 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,
13 453 120 S. Ct. 1587, 1592 (2000).

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

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

1 The record shows Petitioner knew of Mr. Chaziz much earlier than December 2021, so
2 Mr. Chaziz is not newly discovered evidence. Petitioner's PSI was completed on August 18,
3 2008. Id. The PSI identified Ahud Chaziz as co-defendant. Id. Counsel discussed the PSI with
4 Petitioner before sentencing on September 9, 2008. See Reporter's Transcript of Evidentiary
5 Hearing, filed November 13, 2012, at 68-69. Petitioner discussed Mr. Chaziz at the evidentiary
6 hearing. Id. at 151.

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

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

12 Petitioner alleges he has presented a claim of actual innocence, based upon newly
13 discovered evidence, due to his review of his Presentence Investigation Report that was
14 prepared in 2008. 8/25/21 Petition, at 8. When a petitioner cannot demonstrate good cause, the
15 court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to
16 consider the petition would result in a fundamental miscarriage of justice. Pellegrini v.
17 State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To demonstrate prejudice, a defendant
18 must show "not merely that the errors of [the proceeding] created possibility of prejudice, but
19 that they worked to his actual and substantial disadvantage, in affecting the state proceedings
20 with error of constitutional dimensions." Hogan v Warden, 109 Nev. at 960, 860 P.2d at 716
21 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

22 "The conviction of a petitioner who was actually innocent would be a fundamental
23 miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive
24 petition." Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006). However, "actual
25 innocence means factual innocence, not mere legal insufficiency." Mitchell, 122 Nev. at
26 1273-74, 149 P.3d at 36 (quoting Bousley v. United States, 523 U.S. 614, 623-24, 118 S.Ct.
27 1604 (1998)). A fundamental miscarriage of justice requires "a colorable showing" that the
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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

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

6 **2. Joinder and severance**

7 Petitioner requested joinder at his 2012 evidentiary hearing, arguing Mr. Chaziza's case
8 should have been joined with his own so that Mr. Chaziza could have been compelled to testify
9 in Petitioner's favor.¹ See Reporter's Transcript of Evidentiary Hearing, filed November 13,
10 2012, at 151.

11 I know for a fact this is a problem that I'm having also with the, this guy
12 Chaziza, he could have cleared me. If me and him have the same case, if me
13 and him, if I was supposed to be with him and we supposed to be the guys
14 who knocked on the door, why wasn't we convicted together? Why wasn't
15 we together? Because I told my lawyer, I said hey, go and investigate him
16 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.

17 Id.

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

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

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

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

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

22 NRS 174.165 discusses severance, not mandatory joinder. Petitioner cites no authority
23 showing two defendants who commit a crime together must be tried together. This is fatal to
24 his claim that he had a right to be tried with Mr. Chaziz. A party seeking review bears the
25 responsibility “to cogently argue, and present relevant authority” to support his assertions.
26 Edwards v. Emperor’s Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38
27 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d
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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,

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

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

7 **4. Miscellaneous Claims**

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

16 In his other new habeas filing, Petitioner asserts his Miranda rights were violated when
17 the State swabbed his mouth pursuant to a subpoena without the presence of his attorney.
18 12/3/21 Petition at 8. He claims his conviction is "void" because the court lost jurisdiction
19 over him when his counsel was not present. Id. at 9, 10. He reads Miranda v. Arizona to assert
20 that he cannot face trial against DNA taken without an attorney. Id. at 10. Petitioner requests
21 relief from the "shameful-crafty intentional injustice" committed by the prosecutor, court, and
22 defense attorney. Id. at 11. Because "Petitioner was a convicted felon in the state of Nevada,"
23 he feels the State violated NRS 176.09123(3) by taking a DNA sample. Id. This claim ignores
24 NRS 176.09123(5) which allows a court to order a specimen. Furthermore, a cheek swab is
25 not an interrogation under Miranda.

26 Because these claims could have been raised on direct appeal, they are now waived.
27
28

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.

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

9 **IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

13 The Nevada Supreme Court has held that if a petition can be resolved without
14 expanding the record, no evidentiary hearing is necessary. NRS 34.770; Marshall v. State, 110
15 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).
16 A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
17 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
18 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at
19 503, 686 P.2d at 225 (holding that “[a] defendant seeking post-conviction relief is not entitled
20 to an evidentiary hearing on factual allegations belied or repelled by the record”). “A claim is
21 ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the
22 claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

23 It is improper to hold an evidentiary hearing simply to make a complete record. See
24 State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The
25 District Court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted
26 ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary
27 hearing.”). NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:
28

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

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

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

26 **ORDER**

27 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus
28 (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 Misiiler*

KAREN MISIILER
Chief Deputy District Attorney
Nevada Bar #013730

km/appellate

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Henderson, Plaintiff(s)

CASE NO: A-21-840121-W

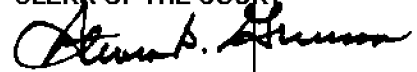
7 vs.

DEPT. NO. Department 1

8 Warden William Guttere,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 JOSEPH HENDERSON,

6 Petitioner,

Case No: A-21-840121-W

Dept No: I

7 vs.

8 WARDEN WILLIAM GUTTERE,

9 Respondent,

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

10
11 **PLEASE TAKE NOTICE** that on October 21, 2022, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed
to you. This notice was mailed on October 27, 2022.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

17 Amanda Hampton, Deputy Clerk

18
19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 27 day of October 2022, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:

23 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:

25 Joseph Henderson # 67224
26 P.O. Box 650
Indian Springs, NV 89070

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

Heather S. Smith
CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISILER
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 –

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

8 On August 28, 2008, Petitioner was sentenced as follows: Count 1 – twelve months in
9 the Clark County Detention Center; Count 2 – sixty-two months to one hundred fifty-six
10 months in the Nevada Department of Corrections (“NDOC”), to run concurrent with Count 1;
11 Count 3 – twenty-four months to sixty months in the NDOC, to run consecutive to Count 2;
12 Count 4 – sixty months to life in the NDOC, plus an equal and consecutive term of sixty
13 months to life for the Use of a Deadly Weapon, to run consecutive to Count 3; Count 5 – sixty
14 months to life in the NDOC, plus an equal and consecutive term of sixty months to life for the
15 Use of a Deadly Weapon, to run consecutive to Count 4; Count 6 – twenty-four months to
16 sixty months in the NDOC, to run consecutive to Count 5; Count 7 – one hundred twenty
17 months to life in the NDOC, plus an equal and consecutive term of one hundred twenty months
18 to life for the Use of a Deadly Weapon, to run Concurrent with Count 6; Count 8 – one hundred
19 twenty months to life in the NDOC, plus an equal and consecutive term of one hundred twenty
20 months to life for the Use of a Deadly Weapon, to run Consecutive to Count 7; Count 9 – one
21 hundred twenty months to life in the NDOC, plus an equal and consecutive term of one
22 hundred twenty months to life for the Use of a Deadly Weapon, to run Consecutive to Count
23 8; Count 10 – twenty-four months to sixty months in the NDOC, to run consecutive to Count
24 9; Count 11 – seventy-two months to one hundred eighty months in the NDOC, plus an equal
25 and consecutive term of seventy-two months to one hundred eighty months for the Use of a
26 Deadly Weapon, to run concurrent with Count 10; Count 12 – seventy-two months to one
27 hundred eighty months in the NDOC, plus an equal and consecutive term of seventy-two
28

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

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

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

16 Petitioner filed a pro per “Successive” Petition for Writ of Habeas Corpus on June 12,
17 2014. The district court denied this Successive Petition on December 2, 2014. Petitioner filed
18 a Notice of Appeal on December 11, 2014. The Nevada Supreme Court affirmed the denial of
19 the writ on September 11, 2015. Remittitur issued October 12, 2015.

20 On August 25, 2021, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
21 Conviction) “Successive” “Newly Discovered Evidence” (hereinafter “8/25/21 Petition”), a
22 Memorandum in Support of “Successive” Writ of Habeas Corpus Petition (Newly Discovered
23 Evidence) (hereinafter “Memorandum”), and an Affidavit/Declaration requesting this Court
24 refrain from appointing him counsel. On October 11, 2021, he filed a Request for Evidentiary
25 Hearing (hereinafter “Request”). On December 3, 2021, he filed a Petition for Writ of Habeas
26 Corpus (Post-Conviction) Second Amended Petition Successive Newly Discovered Evidence
27 (hereinafter “12/2/21 Petition”). On December 23, 2021, Petitioner filed a Motion for
28

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

5 FACTUAL HISTORY

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

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

22 The olive-skinned man demanded to know where Eric kept the safe. Eric told them that
23 he did not have a safe. In an attempt to appease the intruders, Eric gave them approximately a
24 thousand dollars in cash he had hidden in a closet. While the intruders were occupied, Eric
25 was able to get out of his handcuffs. He attempted to get downstairs, but was caught by one of
26 the masked intruders. While scuffling with one of the intruders, Eric was pistol-whipped two
27
28

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

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

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

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

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

26 LVMPD Detective Michael Jefferies obtained a search warrant for a buccal swab from
27 Petitioner, to confirm the DNA match was true and correct. In March 2005, LVMPD forensic
28

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

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

20 21 **ANALYSIS**

22 **I. THE PETITION IS PROCEDURALLY BARRED**

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

27 **A. The Petition is time-barred.**

28

1 The Petition is time-barred pursuant to NRS 34.726(1):

2 Unless there is good cause shown for delay, a petition that challenges the
3 validity of a judgment or sentence must be filed within 1 year of the entry
4 of the judgment of conviction or, if an appeal has been taken from the
5 judgment, within 1 year after the Supreme Court issues its remittitur. For
6 the purposes of this subsection, good cause for delay exists if the petitioner
7 demonstrates to the satisfaction of the court:

- 8 (a) That the delay is not the fault of the petitioner; and
9 (b) That dismissal of the petition as untimely will unduly prejudice
10 the petitioner.

11 “[T]he Legislature has determined that one year provides sufficient time within which
12 to raise claims that trial and appellate counsel provided ineffective assistance.” Rippo v. State,
13 134 Nev. 411, 421, 423 P.3d 1084, 1097, amended on denial of reh'g, 432 P.3d 167 (Nev.
14 2018). The one-year time limit for preparing petitions for post-conviction relief under NRS
15 34.726 is strictly applied because the “procedural default rules ... are supposed to discourage
16 the perpetual filing of habeas petitions.” Rippo at 423, 423 P.3d at 1096.

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

22 The one-year time limit for preparing petitions for post-conviction relief under NRS
23 34.726 is strictly construed. In Gonzales v. State, the Nevada Supreme Court rejected a habeas
24 petition filed two days late despite evidence presented by the defendant that he purchased
25 postage through the prison and mailed the petition within the one-year time limit. 118 Nev.
26 590, 596, 53 P.3d 901, 904 (2002). In contrast with the short amount of time to file a notice of
27 appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no
28 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.

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

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

6 Second or successive petitions include those that allege new or different grounds but a
7 judge or justice finds that the petitioner's failure to assert those grounds in a prior petition
8 would constitute an abuse of the writ. The Successive Petition is an abuse of the writ.

9 NRS 34.810(2) reads:

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

15 Second or successive petitions will only be decided on the merits if the petitioner can
16 show good cause and prejudice. NRS 34.810(3). The burden of proving specific facts that
17 show good cause for his failure to raise his claims earlier falls on the petitioner. NRS
18 34.810(3). Petitioner must also show actual prejudice. NRS 34.810(3).

19 The Nevada Supreme Court has stated: "Without such limitations on the availability of
20 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-
21 conviction remedies. In addition, meritless, successive and untimely petitions clog the court
22 system and undermine the finality of convictions." Lozada v. State, 110 Nev. 349, 358, 871
23 P.2d 944, 950 (1994).

24 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly
25 require a careful review of the record, successive petitions may be dismissed based solely on
26 the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In
27 other words, if the claim or allegation was previously available with reasonable diligence, it is
28 an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,
497-98 (1991).

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

8 **C. These Claims Are Waived**

9 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
10 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
11 conviction proceedings. . . . [A]ll other claims that are appropriate for a direct appeal must be
12 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*”
13 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
14 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). NRS
15 34.810(1)(b)(2) states “The court shall dismiss a petition if the court determines that . . . the
16 petitioner’s conviction was the result of a trial and the grounds for the petition could have been
17 . . . raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction
18 relief.”

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

23 Petitioner was clearly aware of the PSI prepared in 2008, as his attorney, in his presence,
24 referred to the PSI during the sentencing hearing on August 28, 2008. See generally Reporter’s
25 Transcript of Sentencing, filed November 7, 2008. “I just wanted to point out there is an error
26 on the PSI report, but my client would still like to go forward today with sentencing.” Id. at 2.
27 His attorney also acknowledged receiving a supplemental PSI that corrected Petitioner’s
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1 asserted error. Id. at 12. Petitioner's attorney affirmed to the Court that she provided both PSI
2 reports to Petitioner. Id. at 13.

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

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

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

3 **D. Application of the procedural bars is mandatory.**

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

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

13 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
14 when properly raised by the State." Id. at 233, 112 P.3d at 1075. Ignoring these procedural
15 bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The
16 Nevada Supreme Court has granted no discretion to the district courts regarding whether to
17 apply the statutory procedural bars; the rules *must* be applied.

18 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
19 There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of
20 the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
21 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's
22 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
23 procedural bars are so fundamental to the post-conviction process that they must be applied
24 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.
25 Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev.
26 173, 180-81, 69 P.3d 676, 681-82 (2003).

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

3 To avoid procedural default, a defendant has the burden of pleading and proving
4 specific facts that demonstrate good cause for his failure to present his claim in earlier
5 proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly
6 prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952,
7 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104 Nev. 656, 659,
8 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a habeas petition if it presents claims that
9 either were or could have been presented in an earlier proceeding, unless the court finds both
10 cause for failing to present the claims earlier or for raising them again and actual prejudice to
11 the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis
12 added). Petitioner has failed to demonstrate good cause or actual prejudice.

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

14 “To establish good cause, appellants must show that an impediment external to the
15 defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119
16 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
17 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external
18 impediment could be “that the factual or legal basis for a claim was not reasonably available
19 to counsel, or that ‘some interference by officials’ made compliance impracticable.”
20 Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
21 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v.
22 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition
23 must not be the fault of the petitioner. NRS 34.726(1)(a).

24 The Nevada Supreme Court has clarified that a defendant cannot attempt to
25 manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there
26 must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71
27 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the
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1 lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel
2 to forward a copy of the file to a petitioner have been found not to constitute good cause. See
3 Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as
4 recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State,
5 111 Nev. 335, 890 P.2d 797 (1995).

6 A petitioner raising good cause to excuse procedural bars must do so within a
7 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34
8 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
9 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably
10 available to the petitioner during the statutory time period did not constitute good cause to
11 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
12 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,
13 453 120 S. Ct. 1587, 1592 (2000).

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

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

1 The record shows Petitioner knew of Mr. Chaziz much earlier than December 2021, so
2 Mr. Chaziz is not newly discovered evidence. Petitioner's PSI was completed on August 18,
3 2008. Id. The PSI identified Ahud Chaziz as co-defendant. Id. Counsel discussed the PSI with
4 Petitioner before sentencing on September 9, 2008. See Reporter's Transcript of Evidentiary
5 Hearing, filed November 13, 2012, at 68-69. Petitioner discussed Mr. Chaziz at the evidentiary
6 hearing. Id. at 151.

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

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

12 Petitioner alleges he has presented a claim of actual innocence, based upon newly
13 discovered evidence, due to his review of his Presentence Investigation Report that was
14 prepared in 2008. 8/25/21 Petition, at 8. When a petitioner cannot demonstrate good cause, the
15 court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to
16 consider the petition would result in a fundamental miscarriage of justice. Pellegrini v.
17 State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To demonstrate prejudice, a defendant
18 must show "not merely that the errors of [the proceeding] created possibility of prejudice, but
19 that they worked to his actual and substantial disadvantage, in affecting the state proceedings
20 with error of constitutional dimensions." Hogan v Warden, 109 Nev. at 960, 860 P.2d at 716
21 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

22 "The conviction of a petitioner who was actually innocent would be a fundamental
23 miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive
24 petition." Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006). However, "actual
25 innocence means factual innocence, not mere legal insufficiency." Mitchell, 122 Nev. at
26 1273-74, 149 P.3d at 36 (quoting Bousley v. United States, 523 U.S. 614, 623-24, 118 S.Ct.
27 1604 (1998)). A fundamental miscarriage of justice requires "a colorable showing" that the
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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

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

6 **2. Joinder and severance**

7 Petitioner requested joinder at his 2012 evidentiary hearing, arguing Mr. Chaziza's case
8 should have been joined with his own so that Mr. Chaziza could have been compelled to testify
9 in Petitioner's favor.¹ See Reporter's Transcript of Evidentiary Hearing, filed November 13,
10 2012, at 151.

11 I know for a fact this is a problem that I'm having also with the, this guy
12 Chaziza, he could have cleared me. If me and him have the same case, if me
13 and him, if I was supposed to be with him and we supposed to be the guys
14 who knocked on the door, why wasn't we convicted together? Why wasn't
15 we together? Because I told my lawyer, I said hey, go and investigate him
16 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.

17 Id.

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

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27
28 ¹ The spelling of the co-defendant's name differs from document to document.

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

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

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

22 NRS 174.165 discusses severance, not mandatory joinder. Petitioner cites no authority
23 showing two defendants who commit a crime together must be tried together. This is fatal to
24 his claim that he had a right to be tried with Mr. Chaziz. A party seeking review bears the
25 responsibility “to cogently argue, and present relevant authority” to support his assertions.
26 Edwards v. Emperor’s Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38
27 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d
28

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,

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

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

7 **4. Miscellaneous Claims**

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

16 In his other new habeas filing, Petitioner asserts his Miranda rights were violated when
17 the State swabbed his mouth pursuant to a subpoena without the presence of his attorney.
18 12/3/21 Petition at 8. He claims his conviction is "void" because the court lost jurisdiction
19 over him when his counsel was not present. Id. at 9, 10. He reads Miranda v. Arizona to assert
20 that he cannot face trial against DNA taken without an attorney. Id. at 10. Petitioner requests
21 relief from the "shameful-crafty intentional injustice" committed by the prosecutor, court, and
22 defense attorney. Id. at 11. Because "Petitioner was a convicted felon in the state of Nevada,"
23 he feels the State violated NRS 176.09123(3) by taking a DNA sample. Id. This claim ignores
24 NRS 176.09123(5) which allows a court to order a specimen. Furthermore, a cheek swab is
25 not an interrogation under Miranda.

26 Because these claims could have been raised on direct appeal, they are now waived.
27
28

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

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

4 1. A petition may be dismissed if delay in the filing of the petition:

5 (a) Prejudices the respondent or the State of Nevada in responding
6 to the petition, unless the petitioner shows that the petition is
7 based upon grounds of which the petitioner could not have had
8 knowledge by the exercise of reasonable diligence before the
9 circumstances prejudicial to the State occurred; or

10 (b) Prejudices the State of Nevada in its ability to conduct a retrial of
11 the petitioner, unless the petitioner demonstrates that a
12 fundamental miscarriage of justice has occurred in the
13 proceedings resulting in the judgment of conviction or sentence.

14 2. A period exceeding 5 years between the filing of a judgment of conviction,
15 an order imposing a sentence of imprisonment or a decision on direct appeal
16 of a judgment of conviction and the filing of a petition challenging the
17 validity of a judgment of conviction creates a rebuttable presumption of
18 prejudice to the State. In a motion to dismiss the petition based on that
19 prejudice, the respondent or the State of Nevada must specifically plead
20 laches. The petitioner must be given an opportunity to respond to the
21 allegations in the pleading before a ruling on the motion is made.

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

27 Petitioner was found guilty in 2008, thirteen years ago. The facts supporting his claims
28 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.

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

9 IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

13 The Nevada Supreme Court has held that if a petition can be resolved without
14 expanding the record, no evidentiary hearing is necessary. NRS 34.770; Marshall v. State, 110
15 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).
16 A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
17 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
18 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at
19 503, 686 P.2d at 225 (holding that “[a] defendant seeking post-conviction relief is not entitled
20 to an evidentiary hearing on factual allegations belied or repelled by the record”). “A claim is
21 ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the
22 claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

23 It is improper to hold an evidentiary hearing simply to make a complete record. See
24 State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The
25 District Court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted
26 ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary
27 hearing.”). NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:
28

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

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

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

26 **ORDER**

27 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus
28 (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 Misiiler*

KAREN MISIILER
Chief Deputy District Attorney
Nevada Bar #013730

km/appellate

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Henderson, Plaintiff(s)

CASE NO: A-21-840121-W

7 vs.

DEPT. NO. Department 1

8 Warden William Guttere,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

Writ of Habeas Corpus

COURT MINUTES

December 16, 2021

A-21-840121-W Joseph Henderson, Plaintiff(s)
vs.
Warden William Guttere, Defendant(s)

December 16, 2021 12:00 AM All Pending Motions

HEARD BY: Kierny, Carli **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Jill Chambers

RECORDER: Jessica Kirkpatrick

REPORTER:

PARTIES

PRESENT: Zadrowski, Bernard B. Attorney

JOURNAL ENTRIES

- EX PARTE MOTION FOR ORDER TO TRANSPORT PRISONER...PETITION FOR WRIT OF HABEAS CORPUS

As to the Motion to Transport, COURT ORDERED, MOTION DENIED as there was no reason or date for transport given.

Court noted there was no opposition to the Writ filed by the State. Ms. Zadrowski requested time to respond. COURT ORDERED, MATTER CONTINUED.

CONTINUED TO: 2/15/22 12:00 PM

CLERK'S NOTE: The above minute order has been distributed to the Deft. via USPS. jmc 12/22/21

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

July 26, 2022

A-21-840121-W	Joseph Henderson, Plaintiff(s)
	vs.
	Warden William Guttere, Defendant(s)

July 26, 2022 9:00 AM Status Check

HEARD BY: Yeager, Bitia **COURTROOM:** RJC Courtroom 05C

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: Goodman, Laura Attorney

JOURNAL ENTRIES

- Court NOTED a hearing as to the Petition for Habeas Corpus has not been set. Ms. Goodman advised she would prepare a transport order for the defendant's presence. COURT ORDERED, Hearing Date SET.

8/25/22 10:30 AM PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

August 25, 2022

A-21-840121-W Joseph Henderson, Plaintiff(s)
vs.
Warden William Guttere, Defendant(s)

August 25, 2022 10:30 AM Petition for Writ of Habeas Corpus

HEARD BY: Yeager, Bita **COURTROOM:** RJC Courtroom 05C

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

REPORTER:

PARTIES

PRESENT: Henderson, Joseph A Plaintiff

JOURNAL ENTRIES

- Deputy District Stacy Kollins present on behalf of the State.

COURT FINDS AS FOLLOW:

Petitioner fails to demonstrate good cause or sufficient prejudice to permit him to evade the procedural bars. The Petition is time-barred pursuant to NRS 34.726(1).

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.

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's claims could have been raised in his appeal or in his first or second habeas

PRINT DATE: 11/15/2022

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Minutes Date: December 16, 2021

petitions. NRS 34.810.

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.

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. 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.

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).

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 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.

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

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.

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.

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.

The expectation that Mr. Chaziz could have been compelled to testify in Petitioner's favor six months before he pled guilty himself ignores Mr. Chaziz's right to avoid self-incrimination. Mr. Chaziz's pled guilty after Petitioner's trial, he admitted to committing the crimes with Petitioner, and that Mr. Chaziz's was never accused of being the rapist. *Id.* at 154.

Petitioner cites no authority showing two defendants who commit a crime together must be tried together. Petitioner does not show he was entitled to have his trial joined with that of Mr. Chaziz, if Mr. Chaziz had a trial, he cannot show prejudice sufficient to evade the procedural bars.

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. 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. These claims have been addressed on their merits; they cannot provide sufficient prejudice to evade the procedural bars.

Petitioner asserts his Miranda rights were violated when the State swabbed his mouth pursuant to a subpoena without the presence of his attorney. This claim ignores NRS 176.09123(5) which allows a court to order a specimen. Swabbing a cheek is not an interrogation under Miranda.

Successive Petition must also be barred by the doctrine of equitable laches.

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. 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.

Mr. Chaziz was identified in the Presentence Investigation Report filed on August 27, 2008; a hearing is not required to expand the record. The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, no evidentiary hearing is necessary. 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.

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.

COURT ORDERED, Petition for Writ of Habeas Corpus DENIED.

State to prepare the Order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

October 21, 2022

A-21-840121-W	Joseph Henderson, Plaintiff(s)
	vs.
	Warden William Guttere, Defendant(s)

October 21, 2022 3:00 AM Status Check

HEARD BY: Yeager, Bitu **COURTROOM:** No Location

COURT CLERK: Michele Tucker

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Based upon the foregoing, Finding of Fact, Conclusions of Law and Order entered on 10/21/22 , status check is taken OFF CALENDAR.

CLERK'S NOTE: A copy of this minute order was distributed via the E-Service list. / mlt

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated November 1, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volumes with pages numbered 1 through 177.

JOSEPH A. HENDERSON,

Plaintiff(s),

vs.

WARDEN WILLIAM GUTTERE,

Defendant(s),

Case No: A-21-840121-W
Related Case 05C212968
Dept. No: I

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 15 day of November 2022.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk