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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY WHITE, Petitioner-Appellant, v. PERRY RUSSELL, Warden of Warm Springs Correctional Center; AARON FORD, Attorney General for the State of Nevada Respondents-Appellees.	No. 20-16171 D.C. No. 3:04-cv-00412-GMN-CLB MEMORANDUM*

Appeal from the United States District Court for Nevada, Reno
Gloria M. Navarro, District Judge, Presiding

Submitted June 18, 2021**
San Francisco, California

Before: BRESS and BUMATAY, Circuit Judges, and RAYES,*** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

Jerry White appeals from the denial of his successive petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254.

In 2000, White and Michael Woomer were accused of robbery and murder in Nevada. In exchange for his cooperation against White, Woomer was offered and accepted a plea. In a subsequent interview with law enforcement, Woomer directly implicated White in the crimes. A Nevada jury later convicted White of first-degree murder with use of a deadly weapon, robbery with the use of a deadly weapon, and conspiracy to commit robbery with the use of a deadly weapon. With respect to the first-degree murder conviction, the jury returned a general verdict after being instructed on premeditated and felony murder theories. The Nevada Supreme Court affirmed White's convictions on direct appeal, and White's subsequent state post-conviction relief and federal habeas corpus petitions were denied.

In 2009, Woomer recanted his prior statements implicating White. Based on Woomer's recantation, White filed a second state post-conviction relief petition and a successive federal habeas petition, each asserting a freestanding claim of actual innocence. In 2015, the Nevada Supreme Court affirmed the denial of White's second petition, and in 2020 the district court denied White's successive habeas petition but granted a certificate of appealability. White timely appealed. We review the district court's denial of § 2254 relief de novo, *Dows v. Wood*, 211 F.3d 480, 484 (9th Cir. 2000), and affirm.

Neither the Supreme Court nor the Ninth Circuit has conclusively determined whether a freestanding claim of actual innocence is cognizable in federal habeas, although each has assumed without deciding that such a claim is viable. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *Herrera v. Collins*, 506 U.S. 390, 417 (1993); *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014). Assuming cognizability, the requisite showing on such a claim is "extraordinarily high" and must be "truly persuasive." *Herrera*, 506 U.S. at 417. At a minimum, "to be entitled to relief, a habeas petitioner asserting a freestanding actual innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). Unreliable or uncorroborated recantation testimony is insufficient to make that showing. *See Id.* (rejecting freestanding claim of actual innocence based on unreliable recantation testimony); *Jones*, 763 F.3d at 1248 (same).

Even assuming § 2254's deferential standard of review does not apply, *see Jones*, 763 F.3d at 1245, Woomer's recantation is not sufficiently reliable to meet this demanding standard. Woomer has variably claimed memory loss as to the circumstances surrounding the crimes, casting doubt on the reliability of his recantation testimony, which came a decade after the crimes were committed. Moreover, Woomer's recantation testimony changed over the years and is inconsistent with other evidence. For example, Woomer provided inconsistent

accounts of how White came to possess the robbery proceeds and who carried the baseball bat from the victim's house. Certain iterations of Woomer's recantation testimony also diverged in these respects from White's initial account to police. In one version of his recantation, Woomer claimed White carried the baseball bat from the house and took the robbery proceeds from the center console of a car they had been driving, but White told police Woomer carried the baseball bat from the house and that he took the robbery proceeds from an entertainment center in a hotel room the two men shared. Woomer's recantation testimony that White had no involvement in either the robbery or the murder is also undermined by the fact that White possessed the robbery proceeds, and by testimony from an eyewitness who said she saw a man matching Woomer's description shout "wrap it up" from outside the victim's house, followed by a man matching White's description exiting the house while carrying a baseball bat. To the extent Woomer's recantation casts any doubt on White's guilt, it falls short of affirmatively proving White is probably innocent, especially when the jury was instructed on a felony murder theory.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

JERRY WHITE, Petitioner-Appellant, v. PERRY RUSSELL, Warden of Warm Springs Correctional Center; AARON FORD, Attorney General for the State of Nevada, Respondents-Appellees.	No. 20-16171 D.C. No. 3:04-cv-00412-GMN-CLB District of Nevada, Reno ORDER

Before: BRESS and BUMATAY, Circuit Judges, and RAYES,* District Judge.

The panel unanimously voted to deny the petition for panel rehearing. Judges Bress and Bumatay voted to deny the petition for rehearing en banc, and Judge Rayes so recommended. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED**.

* The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JERRY WHITE,

Petitioner

v.

HAROLD WICKHAM, et al.,

Respondents.

Case No.: 3:04-cv-00412-GMN-CLB

Order

Petitioner Jerry White filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. This matter is before this court for adjudication of the merits of the petition. For the reasons discussed below, this court denies the petition, grants a certificate of appealability, and directs the Clerk of the Court to enter judgment accordingly.

Background

White was charged with crimes related to events that occurred in Elko County, Nevada on October 8, 1999. ECF No. 24 at 419. In its order affirming White's convictions, the Nevada Supreme Court described the crime, as revealed by the evidence at White's trial, as follows:

> On October 8, 1999, Ramon Navarro was robbed and bludgeoned to death in his home in Elko, Nevada. Navarro was seen earlier in the morning drinking at a local bar with two individuals later identified as White and co-defendant Michael Woomer. Navarro left the bar in the company of White and Woomer.

> Based on additional witness information, White and Woomer were identified as suspects. Woomer was arrested in Battle Mountain, Nevada, on October 9, 1999. White turned himself in to the custody of Santa Cruz, California, officials two days later on October 11, 1999. Each man gave statements to police officials. Each man asserted that, while present, the other had delivered the fatal blows to Navarro's head with an aluminum baseball bat.

ECF No. 25 at 136-37.

Following a jury trial, White was convicted of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and conspiracy to commit robbery with the use of a deadly weapon. ECF No. 24 at 419. White was sentenced to two life sentences without the possibility of parole for first-degree murder and the deadly weapon enhancement, 35 to 156 months for robbery with the use of a deadly weapon, and 13 to 60 months for conspiracy to commit robbery with the use of a deadly weapon. *Id.* at 420. White appealed, and the Nevada Supreme Court affirmed on March 8, 2002. ECF No. 25 at 136. Remittitur issued on April 2, 2002. ECF No. 25 at 145.

White filed a pro se state habeas petition and a counseled, supplemental state habeas petition. ECF No. 25 at 153, 186. The state district court denied the petition on October 15, 2003. ECF No. 25 at 290. White appealed, and the Nevada Supreme Court affirmed on July 8, 2004. ECF No. 25 at 386. Remittitur issued on August 3, 2004. ECF No. 25 at 395.

White filed a counseled, first amended federal habeas petition on June 17, 2005. ECF No. 19. The Respondents moved to dismiss the first amended petition on October 27, 2005. ECF No. 33. This court granted the motion in part. ECF No. 44. The Respondents answered the remaining grounds in White's first amended petition on November 27, 2006. ECF No. 54. White replied on March 19, 2007. ECF No. 61. This court denied White's petition on September 27, 2007. ECF

No. 62. White appealed. ECF No. 64. The United States Court of Appeals for the Ninth Circuit denied White's request for a certificate of appealability on April 23, 2008. ECF No. 68.

White sought application for authorization to file a second or successive federal habeas petition, which the United States Court of Appeals for the Ninth Circuit granted on January 21, 2010. ECF No. 69. Following this court's reopening of this action, White filed a counseled successor federal habeas petition on February 22, 2010. ECF Nos. 74, 75. The Respondents moved to dismiss White's successor petition on April 30, 2010. ECF No. 78. This court denied the motion without prejudice, pending White's exhaustion of his claim in the Nevada state courts, and granted White's request for the issuance of a stay and abeyance. ECF No. 91.

White filed a second state habeas petition on September 28, 2009. ECF No. 84-4. State district court Judge Andrew J. Puccinelli held an evidentiary hearing on White's second state habeas petition and then issued an order setting a briefing schedule. ECF No. 95-35 at 2. White filed an amended petition, but before Judge Puccinelli could rule on the petition, he passed away. *Id.* A second evidentiary hearing was held on White's petition before state district court Judge Nancy Porter. *Id.* Judge Porter denied White's petition. *Id.* at 10. White appealed, and the Nevada Supreme Court affirmed on November 24, 2015. ECF No. 95-44. Remittitur issued on December 21, 2015. ECF No. 95-45.

White sought reopening of his federal habeas action and leave to file an amended successor petition on February 3, 2016. ECF Nos. 94, 96. This court granted both requests. ECF No. 101. White filed his counseled, amended successor petition on July 3, 2017. ECF No. 103. The petition alleged one ground for relief: his conviction and sentence are invalid because he is actually innocent of first-degree murder, robbery and conspiracy to commit robbery. *Id.* The Respondents moved to dismiss White's amended successor petition. ECF No. 107. This court

denied the motion. ECF No. 121. The Respondents answered White's amended successor petition on September 12, 2018. ECF No. 125. White replied on December 21, 2018. ECF No. 130.

Discussion

A. Standard of review

28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas corpus cases under the Antiterrorism and Effective Death Penalty Act ("AEDPA"):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75 (quoting *Williams*, 529 U.S. at 413). "The 'unreasonable application' clause requires the state

court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Id.* (quoting *Williams*, 529 U.S. at 409-10) (internal citation omitted).

The Supreme Court has instructed that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the standard as a "difficult to meet" and "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt" (internal quotation marks and citations omitted)).[1]

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[1] White argues that AEDPA does not apply to, or is unconstitutional as applied to, freestanding claims of actual innocence because the constitutional right to present and obtain relief for such a claim is a federal constitutional right, not a right rooted in the relief provided by 28 U.S.C. § 2254(d). ECF No. 130 at 71. Because White cannot meet 28 U.S.C. § 2254(d)'s burden of relief and because this court is also not entirely convinced that White is an innocent individual, as is discussed further in this order, this court declines to determine that AEDPA either does not apply to White's freestanding claim of actual innocence or that AEDPA is unconstitutional as applied to White's freestanding claim of actual innocence.

Alternatively, White argues that AEDPA is unconstitutional generally, and as such, his claim should be reviewed de novo. ECF No. 130 at 72. White argues: (1) 28 U.S.C. § 2254(d) "violates § 1 of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment, by depriving citizens in state custody of their fundamental right to meaningful federal review of the federal legality of their state detention"; (2) 28 U.S.C. § 2254(d) "unlawfully suspends the writ of habeas corpus, in violation of Article I, § 9, cl. 2"; and (3) 28 U.S.C. § 2254(d) "unlawfully impinge[s] on the judicial power vested exclusively in the judiciary by Article III." *Id.* at 73. White admits that his latter two arguments have been rejected by the Ninth Circuit, *id.* (citing *Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007)), so this court declines to consider them. With regard to his first argument—28 U.S.C. § 2254(d) violates the Fourteenth and Fifth Amendments—White argues that 28 U.S.C. § 2254(d) "requires federal courts to defer not only to state-court findings of fact, but remarkably, to the

B. Ground 1

In Ground 1, White alleges that his conviction and sentence are invalid under the federal constitutional guarantees of due process of law and freedom from cruel and unusual punishment because he is actually innocent of first-degree murder, robbery, and conspiracy to commit robbery under any theories of liability. ECF No. 103 at 6. White elaborates that his co-defendant, Michael Woomer, recanted his police interview statements and trial testimony in which he accused White of murdering Navarro; instead, Woomer now confesses that he, and he alone, murdered and robbed Navarro while White was passed out in another bedroom. *Id.* White explains that Woomer's new testimony is consistent with the other evidence in the case and that Woomer has no motive to lie, as his new admissions hurt his ability to obtain parole.[2] *Id.* at 20-21.

In White's appeal of the denial of his second state habeas petition, the Nevada Supreme Court held:

> [A]ppellant argues that the district court erred in denying grounds three through five of his petition as procedurally barred, because he has demonstrated that he is actually innocent such that the failure to consider those claims on their merits would result in a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 314-15 (1995); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (adopting the *Schlup* test). To prove actual innocence as a gateway to reach procedurally-barred constitutional claims of error, a petition must show that "'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'" *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting

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state court's interpretation of federal law, and thus to the state court system's self-assessment of its compliance with federal law." *Id.* at 78. This, White argues, requires a federal court to stay its hand and deny relief even in cases in which a state imprisonment truly violates the federal constitution. *Id.* This court finds that this argument lacks merit. Although not discussed in the context of the Fourteenth and Fifth Amendments, the Ninth Circuit has stated generally that "[t]he constitutional foundation of § 2254(d)(1) is solidified by the Supreme Court's repeated application of the statute." *Crater*, 491 F.3d at 1129.

[2] It appears that, following the briefing of this petition, Woomer was granted parole on or about July 17, 2019, ten years after he originally recanted his story.

Schlup, 513 U.S. at 327); *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Appellant has failed to demonstrate a gateway claim of actual innocence.

"To be credible, a claim of actual innocence must be based on reliable evidence." *Calderon*, 523 U.S. at 559 (internal quotations omitted). In his recantation and evidentiary-hearing testimony, Woomer took sole credit for thinking up and carrying out the robbery and murder, indicating that appellant was in no way involved. The district court clearly did not consider Woomer to be credible or reliable. Woomer's recitation of events in his declaration and postconviction testimony, if believed, would have absolved appellant of any of the crimes with which he was charged. But despite Woomer's recantation, the district court nevertheless found that the evidence does not support that appellant is actually innocent of the crimes for which he was convicted. We defer to the district court's implicit findings regarding Woomer's credibility, which are supported by substantial evidence in the record. *See State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233 238 (2006) ("[T]he district court is in the best position to adjudge the credibility of the witnesses and the evidence, and unless this court is left with the definite and firm conviction that a mistake has been committed, this court will not second-guess the trier of fact." (internal quotations omitted)).

Moreover, the district court's finding that appellant failed to demonstrate that he was actually innocent is also supported by substantial evidence in the record. Appellant was convicted of robbery with use of a deadly weapon, conspiracy to commit robbery, and first-degree murder with use of a deadly weapon. The trial testimony of other witnesses was that appellant left the crime scene carrying a bat covered in the victim's blood and was in control of the proceeds of the robbery, supporting that appellant was an active participant in the illegal activity. And one of the theories of first-degree murder was felony murder, such that if appellant had not struck the fatal blows, he would nevertheless have been convicted of first-degree murder. *See* NRS 200.030(1)(b). Accordingly, appellant has failed to demonstrate that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. For this same reason, we conclude that the district court did not err in denying appellant's freestanding claim of actual innocence in which he requested a new trial on the basis of newly discovered evidence (Woomer's recantation of his trial testimony). *See Schlup*, 513 U.S. at 316-17 (suggesting that the test for any freestanding claim of actual innocence would be more stringent than that for a gateway claim); *Callier v. Warden*, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995) (setting out a four-element test for determining whether a petitioner is entitled to a new trial based on newly discovered recantation, the fourth element being that "it is probable that had the false testimony not been admitted, a different result would have occurred at trial").

ECF No. 99-44 at 4-6.[3]

1. Facts

a. Woomer's police interview statements and plea

Law enforcement interviewed Woomer on October 10, 1999. ECF No 72-4. During that interview, Woomer stated that he and White went to Navarro's house in Elko, Nevada after leaving a bar. *Id.* at 9. While Woomer was listening to music in the living room and after White and Navarro "engaged in some type of sexual activity," White "walk[ed] in with the baseball bat. Hit[ ] the guy a couple of times in the head and in the back and everything and sa[id] give me your money." *Id.* at 9, 17. During this time, Woomer "was passed out . . . dazed" and had previously vomited from consuming alcohol. *Id.* at 11, 21.

On January 26, 2000, Woomer entered into a guilty plea agreement whereby he agreed to plead guilty to first-degree murder in return for the State dismissing the remaining charges against him: open murder with the use of a deadly weapon, robbery with the use of a deadly weapon, conspiracy to commit open murder with the use of a deadly weapon, and conspiracy to commit robbery with the use of a deadly weapon. ECF No. 72-7 at 2-3. Woomer "agree[d] to be interviewed by the District Attorney's Office and their investigators" and "to testify with respect to Mr. White's involvement in th[e] case." *Id.* at 3.

Law enforcement interviewed Woomer again on February 15, 2000. ECF No 72-6. Woomer explained that after he, White, and Navarro went to Navarro's house, Navarro started flirting with him, kissing him, and "sucking on [his] neck." *Id.* at 3. Woomer and Navarro then made a deal that Navarro would "pay [Woomer] for giving [Woomer] a blow job." *Id.* Woomer

[3] This court previously concluded that the state district court and the Nevada Supreme Court addressed White's freestanding actual innocence claim on the merits, such that his actual innocence claim was not procedurally defaulted. ECF No. 121 at 5-6.

was unable to get an erection, so he smoked some marijuana and then "started to feel nauseous, . . . so [he] got up and [he] ran to the bathroom and [he] vomited." *Id.* Woomer then heard White demanding Navarro give White his money, and when Woomer exited the bathroom, he saw White "beating [Navarro] with the baseball bat in the living room area." *Id.* White instructed Woomer to search Navarro's residence, and when Woomer returned to the living room, Navarro had regained consciousness and "started charging [White]." *Id.* White hit Navarro again with the bat, and then Woomer "kicked [Navarro] a couple of times." *Id.* at 4. Woomer then went outside, and White came out shortly after saying "he got the money[,] let's go." *Id.*

Thereafter, on March 30, 2000, Woomer was sentenced to life with the possibility of parole after twenty years. ECF No. 72-8 at 3.

b. White's trial

White's trial began on November 9, 2000. ECF No. 72-9. Nevada Highway Patrol Trooper Donald Neff stopped a silver Buick near Wells, Nevada on October 7, 1999, because it lacked a front license plate. *Id.* at 27-28. White was the driver of the vehicle, and a shorter, stockier man, who he later identified as Woomer, was in the passenger seat. *Id.* at 31, 35. White indicated that he and Woomer were on their way to California, that his name was Raymond Huffman, that he had taken a license plate off of a Pontiac and put it on the Buick, and that he did not have a driver's license. *Id.* at 32-33. Trooper Neff located an aluminum baseball bat in White's vehicle during a search. *Id.* at 36. After issuing three citations to White, Trooper Neff advised White to drive to Elko to obtain a temporary moving permit. *Id.* at 38-39.

Wendy Parman provided a room to White and Woomer at the Western Inn in Elko on October 7, 1999. ECF No. 72-9 at 47-50. The next morning, October 8, 1999, Paul Newgard, a bartender at the Scooter Inn in Elko, observed White and another individual at the Scooter Inn

bar with Ramon Navarro, an individual they had met at the bar. ECF No. 72-9 at 53, 56-58, 71. The three individuals consumed beer until approximately 10:00 or 10:30 that morning before leaving the bar together. *Id.* at 56-58. Navarro "had a rather large amount of bills" on his person that morning. *Id.* at 73.

Teresa Jones was sitting on her front porch in Elko at approximately 11:30 in the morning on October 8, 1999, when she saw two men leave the house next door. ECF No. 72-9 at 109-110. One of the individuals "was outside of the house, standing alongside the sidewalk" for about five minutes, then he "went back up to the door and hollered in and started to walk down the steps, and another man joined him from inside the house." *Id.* at 110-111, 115. The first individual, who was shorter, yelled "'[w]rap it up' or 'wrap that up.'" *Id.* at 113-114. The second individual, who was tall and skinny, came out of the house with a baseball bat. *Id.* at 114. The two individuals then started running down the street. *Id.* at 115.

Wilfredo Cervantes, Navarro's roommate, came home from work on October 8, 1999, at 7:00 in the evening and found Navarro "on his knees on the bed." ECF No. 72-9 at 130, 133, 135. Navarro was not breathing. *Id.* at 136. Cervantes testified that there was approximately $8.00 in quarters missing from his room. *Id.* at 141. Deputy Sheriff Dale Lotspeich investigated the crime scene at Navarro and Cervantes' residence on October 8, 1999. ECF No. 72-9 at 176, 189. Deputy Lotspeich testified that "[a] lot" of blood was found in the residence, with "[t]he primary areas of staining [being] in the living room and the master bedroom." *Id.* at 202-203.

Dr. Ellen Clark, a forensic pathologist, performed an autopsy on Navarro on October 9, 1999. ECF No. 72-10 at 25, 28. Navarro suffered from "blunt traumatic injury," including "injuries to the hands and the forearms, to the right leg, to the torso, and injuries aggregated over the face and on the head and scalp." *Id.* at 32. "Navarro died of craniocerebral or skull and brain

injuries due to blunt force trauma" from at least "six separate impacts to the face and the head." *Id.* at 46. Navarro's injuries were consistent with being hit by a metal baseball bat. *Id.* at 47.

Jeffrey Riolo, a criminalist, testified that Navarro's blood was found on a baseball bat, which had been discarded and later located following the attack. ECF No. 72-10 at 160-161, 174. Following their arrest, White and Woomer's shoes were tested, and Navarro's blood was found on both individuals' shoes. *Id.* at 174-175. Navarro's blood was also found on a blue and gold jacket located in White's vehicle. *Id.* at 175. Finally, Woomer's DNA was located under Navarro's fingernails. *Id.* at 179, 186.

White and Woomer drove to Battle Mountain, Nevada following their stay in Elko. ECF No. 72-9 at 142. While in Battle Mountain, White and Woomer encountered Nicole Dodge and her sister later in the day on October 8, 1999. ECF No. 72-11 at 55-56. Dodge testified that she walked to a store with White and Woomer, and White "went in and bought a soda." *Id.* at 58. White put on a black glove, "took a drink of the soda, then he passed the soda to [Woomer], and then [Woomer] dropped the soda" saying "'[t]here's blood.'" *Id.*

White turned himself into Santa Cruz, California law enforcement after learning that there was a warrant for his arrest. ECF No. 72-10 at 90. Thereafter, Detective Connie Bauers interviewed White. ECF No. 72-11 at 202-203. White explained that he and Woomer had stopped in Elko on their way to California and had gone to a bar the following morning. *Id.* at 206. At the bar, White and Woomer met a man, "and then this man bought beer, and the three of them proceeded to his house." *Id.* The three men continued drinking at the individual's house. *Id.* at 207. White eventually got sick and "went into the bathroom and vomited and then went into a back bedroom and laid down on the bed and passed out." *Id.* White was later "woken by Mr. Woomer saying that he had robbed this man. And [White] jumped up, run into the living room

where his tennis shoes were, put them on, and ran out the door." *Id.* As White "was running out the door, he saw the victim laying by the door in the living room area." *Id.* White and Woomer left the residence at the same time with Woomer carrying the bat. *Id.* at 217; ECF No. 72-12 at 21. Woomer discarded the bat following their exit from the house. ECF No. 72-12 at 21. White and Woomer then "jumped in the car and drove about 50 miles to the next town." ECF No. 72-11 at 208. The next day, White proceeded to California without Woomer because "'[Woomer] started bragging about robbing the guy.'" *Id.*; ECF No. 72-12 at 17. Before he left, White took some money that Woomer had stolen from the individual's house. ECF No. 72-11 at 211. White claimed that the blue and gold jacket found in his vehicle belonged to Woomer. ECF No. 72-12 at 14.

Before Woomer testified, an offer of proof was made outside the presence of the jury due to "his alleged memory loss." ECF No. 72-11 at 4. The state district court indicated that it did not "believe Mr. Woomer when he sa[id] that he d[id not] remember" events surrounding his actions on October 8, 1999, and as such, the state district court determined that Woomer would testify and be "available for cross examination." *Id.* at 107.

Thereafter, Woomer testified before the jury that he met a man at the Western Inn in Elko on the morning of October 8, 1999. ECF No. 72-12 at 42, 49. Woomer and the man started drinking vodka, and Woomer explained that "the rest [he did not] remember." *Id.* at 49. Woomer testified that he did not remember telling the police that he went to a bar with White and this individual, that they met Navarro at the bar, that Navarro was flirting with him, that he and White went to Navarro's house, or that he told Navarro, "'[w]hy don't we do something for money?'" *Id.* at 50-51. Woomer then testified that he did not tell the police that Navarro "started kissing [him] and sucking on [his] neck," that he did not know whether he told the police that

"Navarro was going to pay [him] for allowing [Navarro] to perform oral sex on [him]," and that he made up the story about "Navarro t[aking him] into his bedroom and perform[ing] oral sex on [him]." *Id.* at 53-54. Woomer further testified that he made up the following stories to the police: that he "started to feel nauseous and ran to the bathroom and vomited," that "while [he] was in the bathroom [he] heard" White demand that Navarro give him money, and that he saw White beating Navarro "with the baseball bat in the living room area." *Id.* at 55. Woomer also did not remember telling the detectives that "White told [him] to search the house," that Navarro woke up and "started to charge Mr. White," or that White hit Navarro "again in the head or the body." *Id.* at 56-57, 59-60. Additionally, Woomer made up the story that he kicked Navarro, went outside for several minutes to make sure it was clear, and then saw White discard the baseball bat after they had left the residence. *Id.* at 60-61. Further, Woomer did not remember telling the detective that White informed him at the bar that Navarro had a lot of money, that White told him that he wanted to rob Navarro, or that White had his black glove on when they were at Navarro's house. *Id.* at 66-67, 69.

Woomer testified that he "entered into an agreement to testify against Mr. White." *Id.* at 83. Woomer explained that his police interview on February 15, 2000 was taken before his sentencing and he "knew what they were expecting to hear." *Id.* at 84-85. Woomer also explained that witnesses who testify on behalf of the government "get killed" in prison. *Id.* at 52. Finally, Woomer denied getting a tattoo in the Elko County Jail of a skull with a baseball bat, claiming that the unfinished tattoo was a skull with a knife. *Id.* at 86.

c. Judge's letter

Following White's trial, state district court Judge Jack Ames drafted a letter to Warden E. K. McDaniel regarding Michael Woomer on December 4, 2000. ECF No. 114-2. Judge Ames

requested that his letter "be placed in Michael Woomer's permanent filed [sic] to be reviewed when he becomes eligible for parole." *Id.* at 2. Judge Ames then explained the following:

> I was the sentencing Judge for Mr. Woomer concerning a plea agreement which allowed Mr. Woomer to enter a plea of guilty to First Degree Murder. In exchange for his plea, the District Attorney agreed to drop an Enhancement Of Use Of A Deadly Weapon, Robbery With The Use Of A Deadly Weapon and 2 Counts of Conspiracy. Mr. Woomer agreed to testify truthfully against his co-defendant Jerry White.
>
> During Mr. White's trial, Mr. Woomer answered questions concerning events before and after the beating death and robbery of the victim but claimed a loss of memory of the actual events. In spite of Mr. Woomer, the jury found Mr. White guilty of First Degree Murder With The Use Of A Deadly Weapon, A Metal Baseball Bat, Robbery With The Use Of A Deadly Weapon, And Conspiracy To Commit Robbery. Although the District Attorney alleged four theories for First Degree Murder, I believe the jury was convinced of Mr. White's guilt based on the felony murder rule since the victim was beaten to death with a baseball bat during a robbery.
>
> During an Offer of Proof, outside the presence of the jury, Mr. Woomer stated he did not feel that there would be any consequence if he did not testify truthfully concerning the events of the murder. He further laughed at the reminder by counsel that he was under oath. The court agreed to impose a sentence of Life With The Possibility Of Parole for Mr. Woomer believing he was not the person that actually used the bat to beat the victim to death. However, DNA evidence, which was not available at the time of his sentencing, showed that Mr. Woomer's DNA was under the fingernails of the victim. Furthermore, Mr. Woomer lied at this sentencing when asked about a tatoo [sic] on his chest of a skull with a bat through it. Apparently, because it was a jail house tatoo [sic], the quality was such that allowed him to remove most of the tatoo [sic] so that it could not be confirmed at the time of sentencing. The actual artist, however, of the tatoo [sic] testified at Mr. White's trial to impugn Mr. Woomer's credibility.
>
> As the Presiding Judge, I now believe Mr. Woomer was instrumental in the use of the bat to kill the victim. Mr. Woomer violated his agreement to testify truthfully at the trial of Mr. White for which the Enhancement Of The Use Of A Deadly Weapon was dropped making Mr. Woomer eligible for parole in twenty (20) years rather than forty (40) years. Mr. Woomer told the court that nothing could be done to him for his refusal to carry out his agreement. Lastly, he lied to the court at the time of his sentencing.
>
> Mr. Woomer does not deserve to be released on parole one day sooner than Mr. White.

Id. at 2-3.

d. Woomer's post-trial confession

On September 11, 2009, nearly ten years after the robbery and killing of Navarro and nine years after White's trial, Woomer signed a declaration. ECF No. 72-2. In that declaration, Woomer explained that after he and White went to Navarro's house, White eventually "went to the bathroom where he threw up." *Id.* at 2. White "then went to lie down in the other bedroom and passed out." *Id.* At that point, Navarro "began hitting on" Woomer, so Woomer "decided to take his money." *Id.* When Navarro used the bathroom, Woomer retrieved White's baseball bat out of their vehicle, and when Navarro exited the bathroom, Woomer "hit him on the head with the baseball bat." *Id.* at 3. Woomer then searched Navarro's house for any money, located approximately $750 under a mattress, and then went to find White. *Id.* After waking White, Woomer "walked outside to smoke a cigarette while [White] was putting his shoes back on." *Id.* "While [Woomer] was on the porch [he] noticed a neighbor watching [him]," so he "told [White] to hurry up." *Id.*

Woomer explained that he was "making this statement for the first time because [he] want[ed] to come clean" and felt that White "ha[d] gotten a raw deal in all of this." *Id.* Woomer clarified that White "did not kill Ramon Navarro. He was passed out in another room of the apartment when [Woomer] hit Ramon with the baseball bat." *Id.*

Thereafter, on February 4, 2011, an evidentiary hearing was held before state district court Judge Andrew J. Puccinelli. ECF No. 95-18. Woomer testified that he was at the evidentiary hearing "to hopefully get the truth out there, that Jerry White had nothing to do with the murder that happened in 1999." *Id.* at 11-12. Woomer testified that he, White, and another individual that he met in the lobby of their motel on the morning of October 8, 1999, went to a

bar and were drinking. *Id.* at 17-19. Navarro later "walked in[to the bar] and he was very, very flamboyant, buying everybody drinks" and "waving around a lot of cash." *Id.* Eventually White, Navarro, and Woomer left the bar and went to Navarro's house. *Id.* at 19-21. Woomer was wearing the blue and gold jacket. *Id.* at 19-20. When the three men arrived at Navarro's house, they drank some more. *Id.* at 22. After "[m]aybe half an hour" of drinking, White started getting sick and "went into the bathroom and threw up." *Id.* at 24-25. After getting sick, White "went into the other room and laid down." *Id.* at 25.

Navarro started flirting with Woomer, and Woomer "suggested that Mr. Navarro go freshen up." *Id.* When Navarro went to do so, Woomer "ran back to the car" and "grabbed a baseball bat out of the back seat." *Id.* at 26. Woomer explained that he intended to rob Navarro "[a]s soon as he started flirting overtly with [him] and making sexual innuendoes towards him." *Id.* When Woomer returned to the residence, Navarro gestured for them to enter Navarro's bedroom, and "[w]hen [Woomer] got to the bedroom, [he] pulled out the bat" and hit Navarro once in the head "[a]s soon as he crossed the threshold." *Id.* at 28. Navarro was rendered unconscious from the hit, and Woomer "started ransacking the bedroom" looking for money. *Id.* at 29. Woomer got irritated when he could not find any money, "[s]o [he] hit the door with the bat and [he] kicked over the dresser." *Id.* Navarro gained consciousness while Woomer was still in Navarro's bedroom. *Id.* at 30. Woomer ran into the living room, and Navarro followed him. *Id.* Woomer then hit Navarro with the baseball bat "maybe four" times in the head, torso, and legs. *Id.* Woomer then located approximately $715 under Navarro's bed. *Id.* at 32.

Woomer woke White, telling him that they needed to leave. *Id.* at 32-33. Woomer went outside to smoke a cigarette while White got dressed. *Id.* at 33. Woomer saw a neighbor watching him and, from the front stoop, told White to hurry up. *Id.* at 34. Woomer saw White

looking around the living room, "and he was kind of shocked at the scene." *Id.* at 37. White then picked up the baseball bat in the living room and exited the house. *Id.* at 37-38. Woomer took the baseball bat from White and "threw the bat over [a] fence." *Id.* at 38. Woomer and White then got into their vehicle and drove to Battle Mountain. *Id.* at 38-39. Thereafter, White "took the car and all moneys in the console" and left Woomer in Battle Mountain. *Id.* at 94.

After Woomer was arrested in Battle Mountain and transported back to Elko, Woomer was interviewed by police and "told them a bunch of lies that [he] made up" about White committing the crimes in order to protect himself. *Id.* at 45. Woomer explained that his testimony at the evidentiary hearing would not help him get parole. *Id.* at 49.

As indicating previously, before Judge Puccinelli could rule on White's petition, he passed away, so a second evidentiary hearing was held two and half years later before state district court Judge Nancy Porter on August 9, 2013. *See* ECF No. 95-34. Woomer testified again that he—not White—killed and robbed Navarro. *Id.* at 16, 18. Woomer explained that he, White, and Navarro walked to Navarro's house from the bar and started listening to music. *Id.* at 19. White "start[ed] to complain about being sick" and went to a bedroom to rest. *Id.* at 20. Navarro then "started touching on [Woomer] and kissing on [Woomer]," and as soon as Navarro went to the bathroom, Woomer went to retrieve a baseball bat out of White's vehicle. *Id.* at 22. Woomer had "planned to rob [Navarro] and take his money." *Id.* at 22. Woomer did not discuss this plan with White. *Id.* The next thing Woomer remembered was hitting Navarro with the bat in Navarro's bedroom. *Id.* at 24. Woomer did not remember how many times he hit Navarro. *Id.* Woomer looked for money throughout the house and then saw Navarro "coming out back into the living room." *Id.* at 25. Woomer struck Navarro with the baseball bat "several more times." *Id.* Woomer did not remember how many times he struck Navarro or where he struck him. *Id.*

Woomer then started searching for money again and eventually found some under Navarro's bed. *Id.* at 26. Woomer woke White up in the other bedroom. *Id.* at 29. Woomer did not recall who was holding the bat as he and White exited the house, but he remembered throwing it over a fence. *Id.* at 30-31. When White and Woomer left, Navarro "was snoring in the corner." *Id.* at 31.

Woomer's memory during the second evidentiary hearing was weakened: among other things, he did not remember how much money he took from Navarro's house, many details of being at the bar, what happened in Battle Mountain, or what happened to the money he stole from Navarro. *Id.* at 33-34. Woomer explained that he remembered more details when he signed his declaration in 2009 and when he testified at the first evidentiary hearing in 2011. *Id.* at 34. Woomer explained his memory issues: "My memory has blocked it out. It was a very terrible and heinous thing that I committed, and I don't really want to recall it anymore." *Id.* at 80.

Woomer explained that he reached out to the Federal Public Defender's Office in 2008 because he wanted "the truth . . . to come out." *Id.* at 39. Woomer also explained that his trial testimony was not entirely truthful because he "was basically being very, very manipulative because [he] knew that what [he] got out of it was a lesser time." *Id.* at 47.

2. Discussion

The Supreme Court has not yet recognized a freestanding "actual innocence" claim as a constitutional claim. *See, e.g., McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); *Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016) ("The Supreme Court has never recognized 'actual innocence' as a constitutional error that would provide grounds for relief without an independent constitutional violation."). However, if a freestanding

actual innocence claim is cognizable, in order to be successful on such a claim, a petitioner would be required to show:

> a truly persuasive demonstration of "actual innocence" . . . [and] because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Herrera v. Collins, 506 U.S. 390, 417 (1993). This "contemplates a stronger showing than insufficiency of the evidence to convict" or "doubt about his guilt." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). Under these standards, a petitioner must "affirmatively prove that he is probably innocent." *Id.* Additionally, "*Herrera* requires more convincing proof of innocence than" the actual-innocence standard applied in *Schlup v. Delo*, 513 U.S. 298 (1995), for overcoming a procedural bar. *House v. Bell*, 547 U.S. 518, 555 (2006).

To be sure, Woomer has substantial credibility issues. Indeed, Woomer has given six different accounts of the events that occurred on October 8, 1999: (1) during his October 10, 1999, police interview, Woomer blamed White for Navarro's robbery and murder; (2) during his February 15, 2000, police interview, Woomer again blamed White for Navarro's robbery and murder but with slightly different details; (3) during his November 15, 2000, trial testimony, Woomer could not remember the relevant events surrounding Navarro's robbery and murder; (4) in his September 11, 2009, declaration, Woomer indicated that he robbed and murdered Navarro; (5) during his February 4, 2011, post-conviction evidentiary hearing testimony, Woomer again indicated that he robbed and murdered Navarro, but this testimony contained more detail than he included in his September 11, 2009, declaration; and (6) during his August 9, 2013, second post-conviction evidentiary hearing testimony, Woomer indicated that he robbed and killed Navarro, but he could not remember all the details he had provided in

his previous post-conviction evidentiary hearing testimony on February 4, 2011. Despite these credibility issues, Woomer's post-trial confession that he robbed and murdered White *may*, in fact, be true.

The evidence at trial connecting White to Navarro's robbery and murder—other than Woomer's allegations against White—was limited to blood on one of White's shoes, blood on a jacket found in White's vehicle, the neighbor's testimony that White carried the baseball bat out of Navarro's house, and the fact that White had cash on him after Navarro was murdered. However, most of this evidence at trial *could be* consistent with both White's original police interview statement and with Woomer's post-trial confession that White was passed out during the robbery and murder and did not partake in either.

First, White told law enforcement that he was "woken by Mr. Woomer saying that he had robbed this man," so he "jumped up, r[a]n into the living room where his tennis shoes were, put them on, and ran out the door." ECF No. 72-11 at 207. Similarly, in his declaration, Woomer explained that after he woke White, he "walked outside to smoke a cigarette while [White] was putting his shoes back on." ECF No. 72-2 at 3. The location of White's shoes in Navarro's living room, where Navarro's blood was later found, could explain the presence of Navarro's blood on his shoe even if White was passed out in a bedroom during the robbery and murder.

Second, White told law enforcement that the blue and gold jacket found in his vehicle belonged to Woomer. ECF No. 72-12 at 14. And Woomer testified at the first post-conviction evidentiary hearing that he was wearing the blue and gold jacket on October 8, 1999. ECF No. 95-18 at 19-20. As such, the finding of the jacket with Navarro's blood on it in White's vehicle could be consistent with Woomer having worn it during the attack and then having left it in White's vehicle during the drive to Battle Mountain.

Third, White told law enforcement that the baseball bat belonged to him and that Woomer "had the bat" when they left Navarro's residence before Woomer discarded it. ECF No. 72-5 at 11-12. Contrarily, Woomer testified at the first post-conviction evidentiary hearing that while he was waiting outside of Navarro's house for White to put his shoes on, he saw White look around the living room in shock and then pick up the baseball bat in the living room and exit the house. ECF No. 95-18 at 37-38. Woomer testified that he then took the baseball bat from White and "threw the bat over [a] fence." *Id.* at 38. Woomer also testified that the "archaic aluminum bat" had sentimental value to White. *Id.* at 89. Although White denied carrying his baseball bat out of the residence before Woomer discarded it, the fact that a neighbor saw him carrying it out of the residence could be explained by the fact that he simply grabbed it as he was exiting the house due to it having sentimental value for him.

Fourth, White told law enforcement that he left Woomer in Battle Mountain and proceeded to California without him, but before he left, White took some money that Woomer had stolen from Navarro's house. ECF No. 72-11 at 211. And Woomer testified at the first post-conviction evidentiary hearing that White "took the car and all moneys in the console" and left him in Battle Mountain. ECF No. 95-18 at 94. Thus, the fact that White had money could be explained by the fact that he simply took the money from Woomer who had previously taken it from Navarro.

In addition to this trial evidence which could be consistent with White's statement to law enforcement and Woomer's post-trial confession, much of the other evidence at trial supported Woomer's guilt in the robbery and murder: Woomer's DNA was located under Navarro's fingernails, Navarro's blood was found in Woomer's shoe, and Woomer allegedly received a tattoo in the Elko County Jail of a skull with a baseball bat. ECF No. 72-10 at 174-175, 179, 186;

ECF No. 72-12 at 86. Additionally, the state district court judge who presided over White's trial and Woomer's plea and sentencing indicated, following White's trial, that it "believe[d] Mr. Woomer was instrumental in the use of the bat to kill the victim." ECF No. 114-2 at 2-3.

There is other significant evidence supporting the credibility of Woomer's post-trial confession. Woomer was sentenced to life with the possibility of parole after twenty years on March 30, 2000. ECF No. 72-8 at 3. Woomer's declaration confessing to the robbery and murder was signed on September 11, 2009, at least eleven years before he was eligible for parole. Confessing to the robbery and killing of Navarro before he was eligible for parole weighs against a finding of incredibility on Woomer's part. Moreover, Woomer had a motive to lie during his police interview statements. As he explained at the post-conviction evidentiary hearings, he lied to protect himself because he knew he would get "a lesser time" in prison if he put the blame on White. ECF No. 95-18 at 45; ECF No. 95-34 at 47. In fact, Woomer was able to avoid additional convictions for robbery with the use of a deadly weapon, conspiracy to commit open murder with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, and a deadly weapon enhancement for first-degree murder in return for a second police interview and testifying against White. *See* ECF No. 72-7. Accordingly, the entire record, viewed as a whole, supports a finding that Woomer's post-trial confession absolving White of any guilt associated with the robbery and murder were potentially more credible than his police interview statements ten years earlier.

However, similar to the facts in *Carriger*, White has not presented any evidence beyond Woomer's post-trial confession to affirmatively prove his innocence. *See Carriger*, 132 F.3d 463, 477 (9th Cir. 1997) ("Carriger has presented no evidence, for example, demonstrating he was elsewhere at the time of the murder, nor is there any new and reliable physical evidence,

such as DNA, that would preclude any possibility of Carriger's guilt."). In *Carriger*, the Ninth Circuit concluded that Carriger's freestanding actual innocence claim failed because "[a]lthough [the] confession exonerating Carriger d[id] constitute some evidence tending affirmatively to show Carriger's innocence, we cannot completely ignore the contradictions in [the confessor's] stories and his history of lying," and as such, "the confession by itself falls short of affirmatively proving that Carriger more likely than not is innocent." *Id.*

Woomer's previous stories demand the same result here: Woomer's post-trial confession only "constitute[s] some evidence tending affirmatively to show" White's innocence. *Id.* Without more, Woomer's post-trial confession, which was preceded by a history of lying, is insufficient to show that White is actually innocent. Indeed, Woomer and White, who were traveling together from Ohio to California with insufficient funds, were the only two individuals in the house with Navarro when Navarro was robbed and murdered, and Woomer and White each originally pointed the finger at the other person. At one point, each individual claimed to be ill or passed out in a different room while the other committed the heinous acts against Navarro. Therefore, although Woomer's post-trial confession is similar to White's police interview statements thereby aligning their two stories of what happened to Navarro on October 8, 1999, Woomer's post-trial confession, which is plausible as best, falls short of affirmatively proving White's innocence.

Accordingly, even if a freestanding actual-innocence claim is available in noncapital habeas proceedings, White has not presented "a truly persuasive demonstration of 'actual innocence.'" *Herrera*, 506 U.S. at 417. Thus, the Nevada Supreme Court's conclusion that the

state district court did not err in denying White's freestanding claim of actual innocence was reasonable. White is denied federal habeas relief for Ground 1.[4]

Certificate of Appealability

This is a final order adverse to White. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA). Therefore, this court has *sua sponte* evaluated the claim within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

Applying these standards, this court finds that a certificate of appealability is warranted. Although Woomer has credibility issues, the evidence presented at trial, which could be consistent with Woomer's post-trial confession and White's original police interview statements, could cause debate among reasonable jurists whether Woomer's post-trial confession constituted only some—rather than sufficient—evidence tending affirmatively to show White's innocence. Indeed, reasonable jurists could determine that Woomer's post-trial confession that he robbed

[4] White requests that this court "[c]onduct an evidentiary hearing at which proof may be offered concerning the allegations in [his] amended petition and any defenses that may be raised by respondents." ECF No. 103. White fails to explain what evidence would be presented at an evidentiary hearing, especially since two evidentiary hearings were held before the state district court on White's state habeas petition. Additionally, this court has already determined that White is not entitled to relief, and neither further factual development nor any evidence that may be proffered at an evidentiary hearing would affect this court's reasons for denying relief. Accordingly, White's request for an evidentiary hearing is denied.

and murdered Navarro while White was passed out amounted to a "a truly persuasive demonstration of 'actual innocence,'" pursuant to *Herrera*. 506 U.S. at 417.[5]

Conclusion

IT IS HEREBY ORDERED that the Amended Successor Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254 (ECF No. 103) is DENIED.

IT IS FURTHER ORDERED that Petitioner is granted a certificate of appealability for Ground 1.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: May 18, 2020

Gloria M. Navarro, Judge
United States District Court

[5] The parties made several arguments and cited to several cases not discussed above. This court has reviewed these arguments and cases and determined that they do not warrant discussion.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY EMMANUEL WHITE,
Appellant,
vs.
E.K. MCDANIEL, WARDEN,
Respondent.

No. 64756

FILED

NOV 24 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

Appellant argues that the district court erred in denying his petition filed on September 28, 2009, and amended on February 28, 2011. Appellant filed his petition more than seven years after issuance of the remittitur on direct appeal on April 2, 2002. *See White v. State*, Docket No. 37422 (Order of Affirmance, March 8, 2002). Appellant's petition was therefore untimely filed. *See* NRS 34.726(1). Appellant's petition was also successive and an abuse of the writ.[1] NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). We give deference to the district court's factual findings if supported by substantial evidence and not clearly

[1]*White v. State*, Docket No. 42243 (Order of Affirmance, July 8, 2004).

erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose the entire contents of a letter that appellant's sentencing judge wrote and requested to be placed in codefendant M. Woomer's parole file. Although procedurally barred, demonstrating the second and third elements of a *Brady* claim satisfies the good cause and prejudice requirements to overcome that procedural bar. *State v. Huebler*, 128 Nev., Adv. Op. 19, 275 P.3d 91, 95 (2012). "To prove a *Brady* violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." *Id.* (internal quotations omitted).

Even assuming without deciding that the State withheld favorable evidence, appellant has not demonstrated the third element, that he was prejudiced. Appellant argues that the letter's contents justify a lower sentence than he received and that he was denied the opportunity to make the arguments contained in the letter because he did not know about them. However, the letter's author was also appellant's sentencing judge, and appellant has not demonstrated how he was prejudiced by being denied the opportunity to echo the judge's own thoughts back to him at sentencing. Further, although the sentencing judge felt Woomer was "instrumental" in swinging the bat despite Woomer's statements to the contrary, the judge did not feel this was exculpatory vis-à-vis appellant. The sentencing judge noted that it was appellant who carried the bloody bat out of the house, and he discussed the "sinister" use of the batting

glove—which was solely associated with appellant—in his final remarks. In failing to demonstrate this third *Brady* element, appellant has also failed to overcome the procedural bar.

Second, appellant argues that the district court erred in denying grounds three through five of his petition as procedurally barred, because he has demonstrated that he is actually innocent such that the failure to consider those claims on their merits would result in a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 314-15 (1995); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (adopting the *Schlup* test). To prove actual innocence as a gateway to reach procedurally-barred constitutional claims of error, a petitioner must show that "'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'" *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 327); *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Appellant has failed to demonstrate a gateway claim of actual innocence.

"To be credible, a claim of actual innocence must be based on reliable evidence." *Calderon*, 523 U.S. at 559 (internal quotations omitted). In his recantation and evidentiary-hearing testimony, Woomer took sole credit for thinking up and carrying out the robbery and murder, indicating that appellant was in no way involved. The district court clearly did not consider Woomer to be credible or reliable. Woomer's recitation of events in his declaration and postconviction testimony, if believed, would have absolved appellant of any of the crimes with which he was charged. But despite Woomer's recantation, the district court nevertheless found that the evidence does not support that appellant is actually innocent of the crimes for which he was convicted. We defer to

the district court's implicit findings regarding Woomer's credibility, which are supported by substantial evidence in the record. *See State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) ("[T]he district court is in the best position to adjudge the credibility of the witnesses and the evidence, and unless this court is left with the definite and firm conviction that a mistake has been committed, this court will not second-guess the trier of fact." (internal quotations omitted)).

Moreover, the district court's finding that appellant failed to demonstrate that he was actually innocent is also supported by substantial evidence in the record. Appellant was convicted of robbery with use of a deadly weapon, conspiracy to commit robbery, and first-degree murder with use of a deadly weapon. The trial testimony of other witnesses was that appellant left the crime scene carrying a bat covered in the victim's blood and was in control of the proceeds of the robbery, supporting that appellant was an active participant in the illegal activity. And one of the theories of first-degree murder was felony murder, such that if appellant had not struck the fatal blows, he would nevertheless have been convicted of first-degree murder. *See* NRS 200.030(1)(b). Accordingly, appellant has failed to demonstrate that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. For this same reason, we conclude that the district court did not err in denying appellant's freestanding claim of actual innocence in which he requested a new trial on the basis of newly discovered evidence (Woomer's recantation of his trial testimony).[2] *See Schlup*, 513 U.S. at

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[2]The district court separated this argument into two claims: a freestanding claim of actual innocence, and a request for new trial based on newly discovered evidence.

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316-17 (suggesting that the test for any freestanding claim of actual innocence would be more stringent than that for a gateway claim); *Callier v. Warden*, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995) (setting out a four-element test for determining whether a petitioner is entitled to a new trial based on a newly discovered recantation, the fourth element being that "it is probable that had the false testimony not been admitted, a different result would have occurred at trial").

For the foregoing reasons, we conclude that the district court has not erred in denying appellant's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.

Douglas, J.

Cherry, J.

...*continued*

It is unclear whether either iteration of the claim is cognizable in a postconviction habeas petition. NRS 34.724(1) limits the scope of such petitions to "claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State." Appellant's claim of newly discovered evidence does not allege any constitutional violation. Further, neither this court nor the United States Supreme Court has ever held that freestanding claims of actual innocence are available. *See McQuiggin v. Perkins*, 569 U.S. ___, ___, 133 S. Ct. 1924, 1931 (2013). However, as discussed herein, the claim would nevertheless fail on the merits.

cc: Hon. Nancy L. Porter, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

FILED

'01 JAN 16 P4:45

ELKO CO. DISTRICT COURT
CLERK ____ DEPUTY

Case No. CR-FP-007658

Dept. No. 2

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

THE STATE OF NEVADA,

Plaintiff,

vs.

JERRY EMMANUEL WHITE,

Defendant./

JUDGMENT OF CONVICTION

(Jury Verdict)

On November 17, 2000, the above named Defendant JERRY EMMANUEL WHITE, (Social Security Number: 291-74-2772; Date of Birth: June 6, 1979; Place of Birth: Warren, Ohio), was found of guilty at trial by Jury of the crime of COUNT V: FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A CATEGORY A (F), NRS 200.010, 200.020, 200.030, 200.033, 193.165, COUNT IX: ROBBERY WITH THE USE OF A DEADLY WEAPON, CATEGORY B (F) (NRS 200.380, 193.165,and COUNT XIV; CONSPIRACY TO COMMIT ROBBERY WITH THE USE OF A DEADLY WEAPON, A CATEGORY B (F); NRS 199.480, 200.380, 193.165. which crime occurred on October 8, 1999.

Further, that at the time said Defendant was found guilty at trial by said Jury and at the time he was sentenced, he was represented by his attorney, Mark D. Torvinen, Esq.

As a result of the foregoing, this Court, finds the above-named Defendant guilty of the crime COUNT V: FIRST DEGREE

MURDER WITH THE USE OF A DEADLY WEAPON, A CATEGORY A (F);, NRS 200.010, 200.020, 200.030, 200.033, 193.165, COUNT IX: ROBBERY WITH THE USE OF A DEADLY WEAPON, CATEGORY B (F); NRS 200.380, 193.165 and COUNT XIV; CONSPIRACY TO COMMIT ROBBERY WITH THE USE OF A DEADLY WEAPON, A CATEGORY B (F); NRS 199.480, 200.380, 193.165, for which he was found guilty by said Jury and hereby sentences said Defendant on this 10th day of January, 2001, as follows:

> That on Count V the Defendant is sentenced to life in the Nevada State Prison without the possibility of parole and with an equal and consecutive term for the Use of a Deadly Weapon with credit for four hundred fifty seven (457) days heretofore served.
>
> That on Count IX the defendant is sentenced to serve thirty five (35) months to one hundred fifty-six (156) months in the Nevada State Prison, concurrent with Count V.
>
> That on Count XIV that the defendant serve thirteen (13) to sixty (60) months in the Nevada State Prison concurrent with Count IX.
>
> That the defendant submit to blood and/or saliva testing to determine the genetic markers status pursuant to NRS 176.0913 and is to pay the cost of the testing in the amount of Two Hundred Fifty Dollars ($250.00).
>
> That the defendant is to pay restitution in the sum of Two Thousand One Hundred Forty One Dollars and Twenty Cents ($2,142.20) and is jointly and severally liable with the co-defendant for said restitution.

IT IS FURTHER ORDERED, in accordance with the provisions of NRS 176.062, that the Defendant shall forthwith pay to the Elko County Clerk, the sum of Twenty Five Dollars ($25.00), as an administrative assessment, and judgment therefore, is hereby entered against the Defendant.

FURTHER, IT IS REQUESTED BY THIS COURT that the defendant Jerry Emmanuel White not be housed in the same prison

facility as Kelly Rhyne.

THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this Judgment of Conviction as a part of the record in the above-entitled matter.

DATED this 16th day of January, 2001.

Jack B. Ames
District Judge

Copies To:

1. Elko County District Attorney, 575 Court St., Elko, NV 89801
2. Mark D. Torvinen, Esq., 225 Silver Street, #205, Elko, NV 89801
3. Division of Parole & Probation, 3920 East Idaho Street, Elko, NV 89801
4. Director of Department of Prisons, P. O. Box 5154, Carson City, NV 89702 (One Certified copy of Order together with copy of Pre-Sentence Report to accompany defendant to Nevada State Prison).