

No. \_\_\_\_\_

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OCTOBER TERM, 2023  
In the  
**Supreme Court of the United States**

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DAVID STEPHEN MIDDLETON,

Petitioner,

v.

WILLIAM GITTERE, WARDEN,  
AARON FORD, ATTORNEY GENERAL, STATE OF NEVADA,

Respondents.

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*On Petition for Writ of Certiorari to the  
Supreme Court of the State of Nevada*

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**Petition for Writ of Certiorari**

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**CAPITAL CASE**

RENE VALLADARES  
Federal Public Defender, District of Nevada  
DAVID ANTHONY\*  
Assistant Federal Public Defenders  
David\_Anthony@fd.org  
411 E. Bonneville Ave., Ste. 250  
Las Vegas, NV 89101  
(702) 388-6577  
(702) 388-5819 (fax)

\*Counsel of Record for Petitioner

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## QUESTION PRESENTED

(CAPITAL CASE)

In this capital case, petitioner David Middleton presented the Nevada state courts with a colorable claim of actual innocence based on newly discovered evidence that undermines the State's evidentiary presentation against him. Mr. Middleton has shown that the evidence that connected him to the murder victim was untrustworthy based on the false, misleading, and unreliable testimony of key trial witnesses. Further, Mr. Middleton has demonstrated that the forensic evidence connecting him to the murder victim was unreliable. Despite this evidence, the Nevada state courts dismissed the claims without an evidentiary hearing or discovery because the courts failed to consider the totality of the evidence Mr. Middleton presented, pursuant to this Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995).

Additionally, during the pendency of Mr. Middleton's appeal with the Nevada Supreme Court, the State disclosed forensic test results that proved items of women's apparel that Mr. Middleton had in his possession and which the State linked to the murder victim did not belong to her. However, the State failed to conduct forensic testing on additional items of women's apparel that were explicitly linked to the victim at trial. Despite the fact that Mr. Middleton had a procedure available to him to conduct DNA testing of biological evidence, when Mr. Middleton requested to test the additional items, the Nevada state courts denied his request, in violation of his due process rights.

The questions presented are:

1. In a post-conviction proceeding, was Mr. Middleton's right to due process violated when the Nevada state courts failed to consider exculpatory evidence presented in prior habeas petitions in their threshold determination of an actual-innocence gateway claim, thereby erroneously failing to grant him formal discovery of evidence in exclusive possession of the State?
2. Was Mr. Middleton's right to procedural due process violated when the Nevada state courts arbitrarily denied him access to biological evidence for the purposes of conducting DNA testing to prove his innocence?

## **LIST OF PARTIES**

Petitioner David Middleton is an inmate at Ely State Prison. Respondent William Gittere is the warden of Ely State Prison. Respondent Aaron Ford is the Attorney General of Nevada.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner and death row inmate David Middleton requests the Court grant his petition for writ of certiorari to review the judgments of the Nevada Supreme Court affirming the denial of habeas relief and denying his writ petition seeking to order the trial judge to authorize him to conduct DNA testing of biological evidence to prove his innocence.

### **OPINIONS BELOW**

The December 2, 2022, decision of the Nevada Supreme Court affirming the denial of Mr. Middleton's state post-conviction petition for writ of habeas corpus can be found at *Middleton v. Gittere*, 521 P.3d 55 (Nev. 2022) (unpublished). App. A.<sup>1</sup> The Nevada Supreme Court issued its order denying the petition for rehearing on April 17, 2023. App. C.

The December 8, 2022, decision of the Nevada Supreme Court denying Mr. Middleton's petition for writ of mandamus can be found at *Middleton v. Second Judicial District Court*, 520 P.3d 826 (Nev. 2022) (unpublished). App. B. The Nevada Supreme Court issued its order denying the petition for rehearing on April 17, 2023. App. D.

### **JURISDICTION**

The Nevada Supreme Court issued its Order of Affirmance on December 2, 2022, and a timely petition for rehearing was denied on April 17, 2023. The Nevada

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<sup>1</sup> App. cites refer to the appendix filed with the July 6, 2023, application to extend the time to file a petition for a writ of certiorari, which was filed with this Court.

Supreme Court's order denying rehearing on the writ petition was denied the same day. This denial constitutes a final judgment of the highest state court. On July 10, 2023, Justice Kagan granted a timely request for an extension of time to file the petition for writ of certiorari up to, and including, September 14, 2023. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL PROVISIONS**

The Fourteenth Amendment to the United States Constitution provides that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

### **STATEMENT OF THE CASE**

In 1995, Petitioner David Middleton was charged with two counts of first-degree murder for the deaths of Katherine Powell and Thelma Davila. On September 6, 1995, the district court granted Mr. Middleton's pretrial habeas petition on the grounds that the evidence presented at the preliminary hearing was insufficient to constitute probable cause to bind him over for trial. On appeal, the Nevada Supreme Court reversed that judgment and remanded the case to the district court for trial.

Though the deaths of Powell and Davila were separate incidents that occurred in different years, under different circumstances, the two cases were tried together. And despite a substantial lack of reliable evidence linking Mr. Middleton to Davila or her death, he was convicted of both counts of first-degree murder and sentenced to death in 1997. The Nevada Supreme Court affirmed his conviction in 1998.

In his third post-conviction habeas petition, Mr. Middleton raised three claims of constitutional error, supported by newly discovered evidence, and a claim of actual innocence of the death of Davila.<sup>2</sup> Although these claims were filed more than one year after the decision on his direct appeal, in *Berry v. State*, 131 Nev. 957 (2015), Nevada adopted the federal actual-innocence gateway standard established by this Court’s decision in *Schlup v. Delo*, 513 U.S. 298 (1995). Petitioners claiming actual innocence can overcome procedural bars to have their underlying constitutional claims heard on the merits when they present new evidence that makes it “more likely than not” that no reasonable juror would have been able to convict them beyond a reasonable doubt. This new evidence must be considered “on a fully developed record,” which includes consideration of exculpatory information presented in prior petitions, evidence introduced at trial, and any additional information that may not have been admissible at trial. Further, courts are required to assume that the claims presented are true at this stage of consideration.

In denying Mr. Middleton’s present habeas petition, the Nevada Supreme Court imposed a standard that has been explicitly rejected by this Court, multiple state high courts, and prior Nevada precedent by improperly failing to consider the evidence cumulatively. Instead of considering the evidence cumulatively, the Nevada Supreme Court evaluated each claim individually in the current petition in conjunction with only the evidence presented at trial. In doing so, it explicitly

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<sup>2</sup> 12-AA-2879–2937. AA cites refer to the appendix before the Nevada Supreme Court from Mr. Middleton’s third post-conviction habeas petition filed on December 17, 2020.

refused to consider any exculpatory evidence presented in Mr. Middleton’s prior habeas petitions. Based on this flawed analysis, the Nevada Supreme Court held Mr. Middleton did not make a sufficient showing of actual innocence and dismissed the petition without discovery or an evidentiary hearing.

Further, during his current habeas proceedings, the Nevada state courts have denied Mr. Middleton the opportunity to forensically test material evidence that would provide additional exculpatory evidence to further develop his actual innocence claims.<sup>3</sup> In denying Mr. Middleton access to test these materials, the Nevada state courts’ application of the state process was fundamentally inadequate.

This Court should reverse the Nevada Supreme Court’s decision on Mr. Middleton’s present habeas petition because it failed to correctly evaluate the scope of the evidence that must be considered in an actual innocence inquiry, in violation of Mr. Middleton’s right to due process. Additionally, this Court’s recent decision in *Reed v. Goertz*, 598 U.S. 230 (2023), would provide instructive guidance to the Nevada Supreme Court in connection with Mr. Middleton’s argument that he has a due process right to obtain access to exculpatory evidence in which to prove his innocence. Mr. Middleton alternatively seeks a summary grant, vacate, and remand order from this Court for further consideration in light of *Reed*.

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<sup>3</sup> See Nev. Rev. Stat. § 176.0918, which sets the standard for DNA analysis requests outside of Mr. Middleton’s post-conviction habeas proceedings.

## **I. Factual Background.**

For almost thirty years, Mr. Middleton has asserted his innocence of Thelma Davila's murder. During that time, a substantial amount of evidence has emerged that has undermined the State's case against Mr. Middleton.

Davila disappeared on the morning of August 8, 1994, from her apartment complex and was reported missing four days later by her sister, Dora Valverde. At the time of this initial report, Valverde told investigators that there was no property or clothing missing from the apartment, and Davila's purse and money were left behind in plain view on the living room couch. Investigators were unable to place Mr. Middleton, an African American man, inside Davila's apartment and were likewise unable to establish any personal relationship between Davila and Mr. Middleton.

The only evidence investigators were able to develop in reference to Davila's disappearance pointed to a Hispanic perpetrator. Indeed, two weeks prior to her disappearance, a Hispanic man was witnessed pounding on the doors and windows of Davila's apartment. The man has never been formally identified by law enforcement, though Davila's boyfriend fit the description. On August 6, 1994, just two days prior to her disappearance, Davila had spent the night dancing with a Hispanic man. After her disappearance, in August of 1994, James Wilson, a homeowner in Verdi, Nevada—a rural area outside of Reno—witnessed at least one Hispanic individual pull up to an open field near his home in a small blue pickup truck. The occupant opened the back gate of the truck, removed a bundle, and threw

it into the field. On April 9, 1995, the skeletonized remains of Davila were found in that same field.

The Washoe County Coroner, charged with identifying Davila's cause and manner of death, was unable to rule the death as a homicide nor establish how Davila died. Both the cause of Davila's death and the manner of her death are listed as "undetermined" on the official death certificate. The State's case against Mr. Middleton rested essentially on (1) lay witness testimony that a blanket and articles of clothing found in a storage unit owned by Mr. Middleton belonged to Davila; and (2) police testimony that hair found on a roll of duct tape and a blanket in the storage unit were consistent with hair from Davila's hairbrush. However, based on new information developed in the case, it is clear this evidence lacks reliability and is insufficient to connect Mr. Middleton to Davila's death.

**II. Mr. Middleton Has Presented New Exculpatory Information and Evidence of Constitutional Violations at Trial Sufficient to Support a Procedural Innocence Claim.**

In the years since his trial, Mr. Middleton has amassed a substantial amount of evidence that weakens the credibility of testimony and evidence presented at trial, undermines the strength of his conviction, and calls into question the fundamental constitutional fairness of his trial.

In the instant habeas petition, Mr. Middleton made a procedural innocence claim in accordance with the standard imposed by *Schlup* and *Berry* by presenting new evidence that, if credited, constitutes a colorable showing of actual innocence. Considering this new evidence, which challenges the information the State used to

link Mr. Middleton to Davila, it is more likely than not that no reasonable juror would have convicted Mr. Middleton beyond a reasonable doubt of Davila's death.

Mr. Middleton has litigated the State's refusal to comply with its discovery obligations since 1995.<sup>4</sup> In 1997, the trial court held a hearing to discuss the continuance of Mr. Middleton's trial due to the State's "shocking" delay in producing discovery documents.<sup>5</sup> The quantity and quality of the suppressed evidence was such that the trial court delayed Mr. Middleton's trial.<sup>6</sup>

**A. The State Courts Failed to Consider Evidence from Mr. Middleton's Second Post-Conviction Habeas Petition Showing the State Withheld Material Evidence.**

Since his trial, for the past 30 years, Mr. Middleton has consistently litigated the State's refusal to provide him with the materials it is obligated to disclose. In 2010, Mr. Middleton filed his second post-conviction habeas petition in state district court, in which he presented information to substantiate numerous claims of prosecutorial misconduct and evidence showing the State withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).<sup>7</sup> This evidence included a pink plaid blanket that the State alleged Davila owned and Mr. Middleton had in his possession and evidence regarding Dora Valverde's mental state and cognitive ability that affected her credibility.

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<sup>4</sup> 9-AA-02048-2050.

<sup>5</sup> 9-AA-02050.

<sup>6</sup> 9-AA-02050.

<sup>7</sup> 8-AA-01810-9-AA-02139.

## **1. The Ownership of the Pink Plaid Blanket**

To link Mr. Middleton to Davila's death, at trial the State alleged a pink plaid blanket found in Mr. Middleton's storage unit belonged to Davila.<sup>8</sup> Because there was little to connect Middleton to Davila's murder, ownership of the blanket served as a key piece of evidence in Mr. Middleton's case. However, in his second post-conviction habeas petition, Mr. Middleton produced a home video that definitively established the blanket belonged to him, not Davila, and that it had been in his possession for several years prior to her death.<sup>9</sup> Further, Mr. Middleton presented evidence that the State had possession of the video, which definitively undermined the prosecutor's assertions that it belonged to Davila.<sup>10</sup>

## **2. Dora Valverde's Mental and Cognitive Abilities and Credibility**

Dora Valverde, Davila's sister, was a crucial witness for the State. Her testimony was utilized to substantiate claims that the pink plaid blanket as well as a few items of clothing found in Mr. Middleton's storage unit belonged to Davila.<sup>11</sup> These items comprised a substantial portion of the evidence that the State used to link Davila to Mr. Middleton. However, unbeknownst to Mr. Middleton, the State was in possession of information that severely undermined the reliability of Valverde's credibility as a witness.

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<sup>8</sup> See 2-AA-00430, 00443, 00446; 6-AA-01494–01495.

<sup>9</sup> 10-AA-02439, 02441; 10-AA-02443; 11-AA-02640, 02650.

<sup>10</sup> 8-AA-01972–01973.

<sup>11</sup> 1-AA-0021–0022; 18-AA-0431–0432.

Indeed, the State was aware that Valverde was cognitively impaired and confused about the basic facts of her testimony. A pretrial note between the interpreter who was supposed to be used at trial for Valverde's testimony and an investigator at the Washoe County District Attorney's Office stated that Valverde was confused about her sister's age, the date of her disappearance, the amount of time it took Valverde to report Davila missing, and other key details of her testimony.<sup>12</sup> A report generated during pre-sentencing revealed that Valverde's IQ was just 65 and identified her as "mentally retarded."<sup>13</sup> The pretrial note and report create questions about the reliability and susceptibility to coercion of one of the State's key witnesses linking Mr. Middleton to Davila. Despite this evidence showing the State withheld material evidence in violation of *Brady*, 373 U.S. 83, the state district court denied Mr. Middleton's second post-conviction habeas petition.

**B. The State Courts Failed to Consider Evidence in Mr. Middleton's Third State Post-Conviction Habeas Petition that the State Withheld Material Evidence.**

In his instant petition, Mr. Middleton raised multiple *Brady* claims alleging that the State failed to disclose impeachment evidence regarding an interpreter who translated the preliminary hearing testimony of the State's chief witness; that the State withheld a forensic report concerning hair fibers that constitute the sole physical evidence linking Middleton to Davila's death; and that the State has never

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<sup>12</sup> 8-AA-01975; 10-AA-02426.

<sup>13</sup> 10-AA-02428

disclosed a line-up used by the State to elicit testimony regarding Mr. Middleton's identification from an eyewitness.

### **1. The Reliability of Dora Valverde's Testimony**

In his second post-conviction habeas petition, Mr. Middleton produced evidence that Valverde was an unreliable witness. This evidence was expanded in the third post-conviction habeas petition with evidence that the interpreter used for Valverde at the preliminary hearing was also unreliable. Valverde did not speak English, so an interpreter, Carlos Gonzalez, was used by the State for her testimony at Mr. Middleton's preliminary hearing. Gonzalez admitted to distorting his interpretations of court proceedings in favor of whichever party paid his fees.<sup>14</sup> In Mr. Middleton's case, Gonzalez's was not only paid by the State, but he had a particular history of animosity toward Mr. Middleton's counsel of record during the preliminary hearing, Michael Specchio.<sup>15</sup> After the preliminary hearing, Gonzalez was convicted of several crimes, including a sex offense.<sup>16</sup> He was also convicted of perjury for falsifying his qualifications as an interpreter in a separate capital case.<sup>17</sup> At his sentencing hearing for committing perjury during a court proceeding, which occurred prior to Mr. Middleton's trial, the State referred to Gonzalez as a "sociopath" who "does not know how to recognize or offer truthful assertions."<sup>18</sup>

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<sup>14</sup> 12-AA-02809.

<sup>15</sup> 12-AA-02797.

<sup>16</sup> 12-AA-02793.

<sup>17</sup> 12-AA-02787-02789; 12-AA-02804.

<sup>18</sup> 12-AA-2956-02957.

In dismissing Mr. Middleton's third post-conviction habeas petition, the district court found that this information did not constitute a *Brady* violation because it was reasonably available to Specchio at the time of the preliminary hearing.<sup>19</sup> Therefore, the Court held the claim was procedurally barred.<sup>20</sup> However, the court did not consider that Specchio stepped down from the case following the preliminary hearing and did not convey any information regarding Gonzalez or his criminal history to his successor defense counsel, Frederick Pinkerton. More importantly, regardless of whether defense counsel could have reasonably discovered this information about Gonzalez, the State failed to comply with its constitutional requirement to disclose material evidence to Mr. Middleton. Yet the state court did not consider the State's lack of compliance with their disclosure requirements and did not reach a determination of whether Mr. Middleton's procedural innocence claim should include the consideration of this evidence.

The state court further found there was no *Brady* violation in this case because Mr. Middleton presented conclusory statements of prejudice and did not show how Gonzalez's interpretations were wrong.<sup>21</sup> However, material portions of Valverde's testimony during the preliminary hearing were in direct contradiction to her prior statements to law enforcement. For example, Valverde originally told investigators when Davila disappeared that nothing had been taken from their

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<sup>19</sup> 18-AA-04347.

<sup>20</sup> 18-AA-04347.

<sup>21</sup> 13-AA-03169.

apartment, including clothing.<sup>22</sup> By contrast, when testifying through Gonzalez, Valverde identified clothing found in Mr. Middleton's storage unit as belonging to Davila.<sup>23</sup> Similarly, Valverde originally told law enforcement the pink plaid blanket admitted into evidence was in the closet of her apartment. However, when testifying through Gonzalez, she stated that the blanket was missing and identified the pink plaid blanket found in Mr. Middleton's storage unit as Davila's.<sup>24</sup>

## **2. The Hair Fiber Evidence and Forensic Report**

Outside of Valverde's unreliable testimony regarding the clothing and the pink plaid blanket found in Mr. Middleton's storage unit that she later claimed belonged to Davila, there were only two pieces of physical evidence that connected Mr. Middleton to Davila. Davila's hair was purportedly found on a piece of duct tape and a purple plaid blanket, both recovered from Mr. Middleton's storage unit. This physical evidence is unreliable because, as Mr. Middleton has continued to assert, there is an exculpatory forensic report that has never been disclosed to him. A pretrial discovery order by the court explicitly required disclosure of forensic reports generated for the case, yet, in direct violation of the court's order, the State has never produced this report.

## **3. The Strand of Hair Located on the Roll of Duct Tape**

Police executed a search warrant of a storage unit owned by Mr. Middleton on March 5, 1995. Among the items seized by criminalist Charles Lowe was a cooler

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<sup>22</sup> 13-AA-03095–03096.

<sup>23</sup> 1-AA-0021–0022; 18-AA-0431–0432.

<sup>24</sup> 2-AA-0430; 0443, 0446.

containing a roll of duct tape.<sup>25</sup> Although there are close-up photos of almost every other item recovered from the cooler, no photographs of the duct tape have ever been disclosed to Mr. Middleton.<sup>26</sup> This is significant because the duct tape became an extremely important piece of evidence at trial; a single hair fiber, purportedly belonging to Davila, was allegedly discovered on the roll of duct tape.<sup>27</sup> Yet, none of the initial reports regarding the duct tape indicate that it contained hair or trace evidence of any kind.

On March 6, 1995, the day after Mr. Middleton's storage unit was searched, Valverde provided the police department with three of Davila's hairbrushes.<sup>28</sup> On March 13, 1995, Lowe performed an examination of the duct tape, but did not indicate that any hair nor any other trace evidence had been found on it.<sup>29</sup>

Between March 15, 1995, and March 20, 1995, Reno Police Department Detective Ed Dixon submitted two of three requests for the duct tape to be examined by the Washoe County Sheriff's Office Forensic Science Division for "trace evidence."<sup>30</sup> The second request does not indicate why the duct tape needed to be

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<sup>25</sup> At the preliminary hearing (07/18/1995 PHT at 51-52) and at trial (08/27/1997 TT at 1482, 1556), Lowe testified that the duct tape had been found inside the cooler; later in the trial, Lowe testified that the duct tape had been found "on top of the cooler." *Id.* at 1557-58.

<sup>26</sup> 18-AA-04307.

<sup>27</sup> No duct tape was found on or near Davila's body. Additionally, no duct tape was recovered anywhere in the surrounding area or was associated with her remains in any way.

<sup>28</sup> 16-AA-0398-03987.

<sup>29</sup> 12-AA-02993-02994.

<sup>30</sup> 12-AA-02987-02990.

examined again, nor does it indicate that the duct tape contained any hair evidence.<sup>31</sup>

On March 28, 1995, criminalist Richard Berger examined Davila's hairbrushes and removed hair from them.<sup>32</sup> One day later, Dixon submitted a third request for a comparison of the hair found on the duct tape to hair exemplars.<sup>33</sup> This request, which was made over three weeks after the duct tape was discovered and after two previous examinations of the tape, was the first time reports suggest hair was found on the tape. On April 3, 1995, approximately one month after the duct tape was found in Mr. Middleton's storage locker, Berger packaged eight hair fibers allegedly found on the duct tape.

On April 10, 1995, the hairbrushes were checked out by Detective Adams.<sup>34</sup> The location of the hairbrushes remained unknown for the next seven months. During this time, Berger authored several reports that indicate he had been in possession of the hairbrushes and, on November 15, 1995, Berger returned them to the evidence vault.<sup>35</sup> All hair evidence purportedly produced from the duct tape was kept and analyzed during this seven-month period. DNA testing later confirmed that the hair on the duct tape was consistent with Davila's profile.

In violation of a pretrial discovery order and its disclosure obligations under *Brady*, the State has refused to disclose the report or any other documentation from

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<sup>31</sup> 12-AA-02987-02988.

<sup>32</sup> 13-AA-03153-03154.

<sup>33</sup> 12-AA-02991-02992.

<sup>34</sup> 17-AA-04013-04014.

<sup>35</sup> 17-AA-04011-04012.

Lowe related to the initial examination of the duct tape and has refused to disclose any photos taken of the tape at the time of its collection. Multiple requests were made by law enforcement to have Lowe examine the duct tape, with no assertion regarding any hair fiber or trace evidence found on it; only upon an inexplicable third request for its examination is any mention made of any hair. Further, Davila's hairbrushes, which were provided to law enforcement for comparison purposes, went not checked into evidence for seven months during the generation of the hair fiber analysis reports and first surfaced in the possession of Berger, who collected the evidence in question during this time.

The duct tape is not the only piece of material evidence that was mishandled in this case. Davila's hair was also found on a purple plaid blanket found in Mr. Middleton's storage unit, but the evidence was mishandled and the subsequent DNA report with respect to that evidence was unreliable. Lowe seized two blankets, a pink plaid blanket, which Valverde identified as Davila's, and a purple plaid blanket, from Mr. Middleton's storage unit. Lowe performed an examination of the pink plaid blanket on March 13, 1995, but there are no reports or photographs documenting the examination of the blanket on that date.<sup>36</sup> On March 24, 1995, police officers showed the blankets to Powell's relative for identification; however, there is no information or reports regarding this meeting.<sup>37</sup>

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<sup>36</sup> 17-AA-04034-04035.

<sup>37</sup> 17-AA-04047-04048.

On May 10, 1995, Valverde and a friend were invited to view the blankets and other property seized during the investigation.<sup>38</sup> During this visit, they were invited to touch the property, including the blankets, without wearing gloves, hairnets, or any other barrier devices designed to reduce the transfer of hair or other trace evidence. On the same day, both blankets were subject to examination by David Billau who collected one strand of hair from the pink plaid blanket.<sup>39</sup> However, there are no photographs or reports documenting his collection of this strand.

Billau failed to properly document the collection of material physical evidence. There is evidence that Billau was not qualified to perform his job, and the State failed to disclose to Mr. Middleton that Billau committed perjury in other capital murder trials regarding his qualifications.<sup>40</sup> In the 1990 death penalty trial of Roger Libby, Billau testified he received an associate degree in general education from City of Glendale College and a bachelor of science degree from California State University in Los Angeles. However, ten years later, in 2000, Billau testified at Kelly Rhyne's capital trial that he had an associate degree in photography, worked towards receiving a bachelor of arts degree, and studied industrial studies and criminal justice at California State University, but did not complete his degree. It is unclear if Billau had anything more than a high school diploma. It is clear, however,

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<sup>38</sup> 17-AA-04053–04056.

<sup>39</sup> 16-AA-04000–17-AA-04002.

<sup>40</sup> 8-AA-01906–01908.

that Billau perjured himself in the 1990 Libby trial by materially misstating his qualifications in a capital case.

On May 17, 1995, Berger performed a forensic examination on the blankets.<sup>41</sup> In his report, Berger documented that one strand of hair had already been collected from the pink plaid blanket and left in an envelope taped to the inside of its box by Billau.<sup>42</sup> Berger collected a second strand of hair from the blanket and labeled these strands T-1 and T-2 respectively; there are no photographs or bench notes that document Berger's investigation of the pink plaid blanket. Both strands were collected in one envelope and sent for further DNA testing. Similarly, two strands of hair were collected from the purple plaid blanket and labeled as T-1 and T-2. Berger again put both strands of hair in one envelope and sent them for further DNA testing on the hair roots.

On July 16, 1995, Criminalist Berch Henry generated a summary report regarding the two strands of hair found on blankets.<sup>43</sup> Henry determined that the hair from the pink plaid blanket belonged to Davila and that the hair from the purple plaid blanket matched Powell; he testified to that effect at Mr. Middleton's preliminary hearing. In a subsequent report generated on April 6, 1996, Henry switched his conclusions regarding the origin of the hair, stating that the hair on the pink plaid blanket belonged to Powell and that the hair on the purple plaid

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<sup>41</sup> 16-AA-04000-17-AA-04002.

<sup>42</sup> 16-AA-04000-17-AA-04002.

<sup>43</sup> 17-AA-04024-04026.

blanket belonged to Davila.<sup>44</sup> In addition to this substantial mistake, the two reports are riddled with numerous typographical errors. Despite the significant error, the State relied on the DNA evidence to prove there was a connection between Middleton and Davila.

#### **4. The State Court Improperly Dismissed Evidence Supporting Mr. Middleton's Procedural Innocence Claim Without Allowing him to Conduct Discovery**

The state courts dismissed Mr. Middleton's procedural innocence claim based on this evidence on the grounds that he offered no new evidence of innocence, but merely "speculation and hoped-for conclusions."<sup>45</sup> However, there is compelling evidence in the record that an additional report exists, i.e., the one based on Lowe's March 1995 examination, and the inexplicable lack of photos at the scene plus the State's repeated requests for examination of the duct tape, provide a very specific deduction for what the documents will reveal: that the hair fiber was not attached to the duct tape at the time of its collection. However, the report remains in the exclusive possession of the State in violation of the trial court's pretrial discovery order.

Alternatively, the state courts asserted that—even if the report proved that law enforcement had planted the crucial hair fiber evidence—it would not have made a difference at trial.<sup>46</sup> Inexplicably, the Nevada Supreme Court dismissed the import of such evidence, stating it did nothing more than undermine "the trial

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<sup>44</sup> 17-AA-04015–04020.

<sup>45</sup> App. A at 5.

<sup>46</sup> App. A at 5–6.

evidence that Davila's hair was found on a roll of duct tape seized from Mr. Middleton's storage unit.”<sup>47</sup> However, if this piece of evidence were discredited, it indisputably calls into question the validity of Mr. Middleton's conviction for the death of Davila. The hair fiber evidence is the *only* physical evidence linking Davila to Mr. Middleton's storage unit. The remainder of the case rests on circumstantial and unreliable eyewitness testimony that has been effectively undermined by other new evidence produced by Mr. Middleton in the instant and prior habeas state proceedings.

The other evidence produced by the State to connect Mr. Middleton to Davila's murder is speculative and of little probative value. The State presented witnesses that allegedly identified Mr. Middleton in areas near those which Davila frequented. However, each of these eyewitness statements were elicited between eight to twelve months after a fleeting encounter with an unknown Black man. None of the witnesses claimed any meaningful interaction with the man, and all denied having spoken to the man in question. One witness, Lucille Pooler, a neighbor of Davila's purportedly identified Mr. Middleton in a photo lineup, but the State has never produced any information regarding the circumstances of the photo array in which Pooler identified Middleton.<sup>48</sup> Pooler testified she identified Mr. Middleton as a man she saw near Davila's apartment on the day of her disappearance. However, this testimony was inconsistent with her prior statements and was impeached. Pooler originally told

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<sup>47</sup> App. A at 6.

<sup>48</sup> 2-AA-00260; 14-AA-03422.

police she observed a Black male walking up some stairs that led to the apartment when he turned around and walked back down.<sup>49</sup> In her original statement to police, Pooler described the Black male as being of medium height and medium build. This description does not match Mr. Middleton, who is six-foot-three-inches tall and weighs 230 pounds. Importantly, when she first spoke to police, Pooler stated she did not see the man's face.<sup>50</sup>

The prosecution also attempted to link Mr. Middleton to Davila with a piece of rope. The State presented evidence that rope found with Davila's body "matched" the rope found in Mr. Middleton's storage unit.<sup>51</sup> Although the State indicated the rope was a significant piece of evidence connecting Mr. Middleton to Davila's murder, two of the prosecution's own witnesses acknowledged that the rope was a very common type of rope.<sup>52</sup> One even agreed that the rope was probably available at every hardware store.<sup>53</sup> Additionally, the State attempted to distinguish the knot found on both pieces of rope. But just as with the type of rope, the type of knot was established to be common. Consequently, the rope evidence is of minimal probative value.

The State attempted to connect Mr. Middleton to Davila by claiming that Davila had been previously seen with Evonne Haley, Mr. Middleton's ex-wife. However, this evidence is not very probative. Even if Davila was seen with Haley, the

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<sup>49</sup> 18-AA-4298.

<sup>50</sup> 2-AA-0402.

<sup>51</sup> 16-AA-3951.

<sup>52</sup> 3-AA-0551; 5-AA1104.

<sup>53</sup> 3-AA-0551.

State's argument that this implicates Mr. Middleton in Davila's murder is entirely speculative and too attenuated.

Finally, the State presented Exhibit No. 164A, comprised of three items of clothing—a black blouse, a pair of underwear, and a red hair tie—found in Mr. Middleton's storage unit that were “identified” by witnesses as belonging to Davila. Valverde testified that the clothing belonged to Davila,<sup>54</sup> but, as demonstrated by her erroneous identification of the pink plaid blanket, her testimony is not credible. Susan Gamboa, Valverde's friend, testified that the clothing was the same style as the clothing Davila had worn.<sup>55</sup> However, she denied being able to definitively identify the clothing as Davila's, stating the blouse “could be[long] to anyone else.”<sup>56</sup> Similarly, Rodney Dean Philips, an acquaintance of Davila's, could only say that the blouse and hair tie resembled items of clothing that Davila wore but could not specifically identify them.<sup>57</sup>

In 2014, the State moved the trial court to withdraw Exhibits No. 164 and 164A for forensic testing and subsequently conducted DNA testing on Exhibit No. 164, which is comprised of items of female clothing that were contained in the same bag as Exhibit No. 164A.<sup>58</sup> The analysis revealed that the clothing in Exhibit 164 only contained Haley's DNA—not Davila's. Mr. Middleton has always asserted that

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<sup>54</sup> 2-AA-00457.

<sup>55</sup> 2-AA-00460.

<sup>56</sup> 2-AA-00459.

<sup>57</sup> 2-AA-00466.

<sup>58</sup> 11-AA-02673–02679.

all the clothing found in his storage unit belonged to Haley. Therefore, this analysis serves only to bolster his credibility and undermine that of the State's witnesses.

Mr. Middleton presented the state courts with a colorable claim of actual innocence in connection with the Davila homicide. The newly discovered evidence undermines the State's evidentiary presentation against him and demonstrates there is no longer sufficiently reliable evidence to support his conviction.

### **III. The Nevada Courts Have Denied Mr. Middleton the Ability to Conduct DNA Testing on Material Items of Evidence from His Case.**

On April 15, 2014, the State filed a motion to withdraw Exhibit Nos. 164 and 164A from the trial evidence vault for forensic DNA analysis.<sup>59</sup> These exhibits both contained female clothing that was found in Mr. Middleton's storage unit. Exhibit No. 164A contains three articles of clothing identified by witnesses at trial as Davila's.

At trial, the State relied heavily on Exhibit No. 164A with three prosecution witnesses testifying that the items of clothing resembled the sort of clothing that Davila wore. The State used this testimony to assert conclusively to the jury that the items belonged to Davila and that their presence in the storage unit demonstrated a definitive link between Davila and Mr. Middleton.

The State's 2014 request was renewed in a second request to conduct DNA analysis in 2019.<sup>60</sup> Shortly thereafter, Mr. Middleton moved for discovery and

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<sup>59</sup> 11-AA-02673–02679.

<sup>60</sup> 16-AA-03929–03931.

requested, should the forensic analysis occur, that he be permitted to have his own expert present during testing.<sup>61</sup> Mr. Middleton also requested that he receive any results generated from that analysis. On April 21, 2020, the district court granted the State’s motion to withdraw Exhibit Nos. 164 and 164A.<sup>62</sup> While the district court denied Middleton’s request to have his own expert present during the testing, it granted his request to receive the results of the State’s forensic testing.

The State submitted Exhibit No. 164 to the Washoe County Sheriff’s Office Forensic Science Division, which issued its report on August 31, 2021. The results confirmed that the DNA obtained from the items of clothing in Exhibit No. 164 did not match Davila, Powell, or any other unsolved case; instead, the clothing contained DNA belonging to Middleton’s ex-wife, Haley. The results supported the assertion that all the clothing located in the storage unit belonged to Haley, as Middleton has always claimed.

Though the State asserted in a brief filed with the Nevada Supreme Court on March 5, 2021, that it had conducted forensic analysis of the contents of Exhibit No. 164A, the report it disclosed to Mr. Middleton referenced only Exhibit No. 164. The report did not mention Exhibit No. 164A or any items contained therein. Because the district court denied Mr. Middleton’s request to have his own expert present during the forensic analysis, it is not clear whether the State failed to test the items in Exhibit 164A in contradiction to the order of the district court, or whether it

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<sup>61</sup> 16-AA-03979–03980.

<sup>62</sup> 18-AA-04341.

failed to disclose the results of that testing in violation of the State's disclosure obligations and the order of the district court.

On August 23, 2022, Mr. Middleton filed a motion with the district court, requesting to withdraw Exhibit No. 164A for DNA testing. Concurrently, Mr. Middleton filed a motion for limited remand with the Nevada Supreme Court to facilitate the DNA testing. The State opposed both motions.

On September 19, 2022, the Nevada Supreme Court denied Mr. Middleton's motion for limited remand on the grounds that he had not shown that remand was necessary and that, even if he had, Mr. Middleton had not used the proper procedure. The court stated the proper procedure was to obtain an indicative ruling from the district court, per the Nevada Rules of Appellate Procedure, and to then seek a remand from the Nevada Supreme Court.

On September 22, 2022, the district court issued an order agreeing with the State's opposition to Mr. Middleton's motion to withdraw Exhibit No. 164A for DNA analysis and directing the State to submit a proposed order on the matter which could include "both jurisdictional and substantive bases for the denial." Mr. Middleton immediately moved for clarification and/or reconsideration of the order, inquiring whether the district court had intended for its order to constitute an indicative ruling under Rule 12A(a) of the Nevada Rules of Appellate Procedure, and, if not, requesting an indicative ruling.

The State opposed this motion, arguing that the district court did not have the jurisdiction to make an indicative ruling on this issue because the motion was

not independent from the matters before the Nevada Supreme Court in Mr. Middleton's pending post-conviction habeas petition. On October 6, 2022, the district court agreed with the State, concluded that it did not have jurisdiction to consider Mr. Middleton's motion to withdraw Exhibit No. 164A and explaining that, under Nev. R. App. P. 12A(a), the district court retains limited jurisdiction only to "matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits." Because the basis of Mr. Middleton's motion to withdraw Exhibit No. 164A was not independent from the allegations in the post-conviction habeas petition then-pending before the Nevada Supreme Court, the district court reasoned that it did not have the jurisdiction to consider Mr. Middleton's motion. The district court did not expressly address Mr. Middleton's motion requesting an indicative ruling.

In summary, the Nevada Supreme Court held the proper procedure for Mr. Middleton to obtain material evidence from his trial for forensic testing was to ask the district court for an indicative ruling pursuant to Nev. R. App. P. 12A. Mr. Middleton did so; however, the district court stated that it lacked jurisdiction to issue such a ruling because Mr. Middleton had a habeas appeal pending before the Nevada Supreme Court. The court acknowledged Mr. Middleton requested the DNA testing to more fully develop the claims raised in that very same habeas petition.

In response, Mr. Middleton filed a petition for writ of mandamus with the Nevada Supreme to direct the district court to allow him to withdraw and test Exhibit No. 164A for DNA evidence, the same courtesy that the district court had

extended to the State. However, the Nevada Supreme Court denied Mr. Middleton's petition for a writ of mandamus. In doing so, it stated that Mr. Middleton "had an adequate legal process to seek it," citing Nev. R. App. P. 12A (providing process to seek remand to the district court when the district court denies motion for lack of jurisdiction but indicates it would grant motion or that motion raises substantial issue).

While the district court simply concluded that it lacked jurisdiction, the Nevada Supreme Court excused the district court's failure to grant Mr. Middleton's motion to develop evidence related to a claim in the post-conviction petition on alternative grounds. The Nevada Supreme Court held the district court's decision not to consider the motion did not constitute a manifest abuse or capricious exercise of its discretion because the motion was submitted "over two years after he filed the notice of appeal from the district court's order denying his post-conviction habeas petition."

In the Nevada Supreme Court's affirmation of the district court's denial of Mr. Middleton's post-conviction petition for a writ of habeas corpus, the court provided an additional reason for its denial of Mr. Middleton's motion on the grounds that Mr. Middleton "did not seek to conduct genetic marker testing on evidence while his petition was pending below and did not assert any claims or good cause based on new evidence as a result of genetic marker testing."

Due to these decisions, Mr. Middleton has not been afforded the opportunity to conduct DNA testing or other forensic analysis on these material items of

evidence. This testing would add to the substantial body of evidence undermining the validity of Mr. Middleton's conviction and death sentence.

#### **REASONS FOR GRANTING THE PETITION**

This Court will review a capital habeas case arising from a state judgment in which state courts have categorically failed to address fundamental constitutional defects in the trial and habeas proceedings.

In the instant petition, Mr. Middleton has introduced new evidence supporting a claim of actual innocence in the death of Thelma Davila. This evidence should have properly provided a gateway to overcome state procedural bars to the consideration of Mr. Middleton's claims of constitutional error at trial. In denying formal discovery and an evidentiary hearing on his procedural innocence claim, the Nevada state courts failed to consider the totality of evidence in the record in their evaluation of whether Mr. Middleton had met the actual-innocence threshold.

Mr. Middleton remains on death row, and key evidence used against him at trial has never been forensically analyzed. The Nevada state courts have further denied Mr. Middleton's right to due process by denying him the ability to conduct DNA testing that would provide additional exculpatory evidence towards the development of his innocence claims.

Though state court judgments of criminal procedure are entitled to substantial deference, federal courts may interfere with state post-conviction procedures where they are "fundamentally inadequate." *Schlup*, 513 U.S. at 299. This Court held in *Reed* that a state court's construction of a state-provided DNA

testing statute could be fundamentally inadequate as a matter of due process when it precludes the relief that it was created to provide. *Reed*, 598 U.S. at 236.

Similarly, the Nevada state courts violated Mr. Middleton’s due process rights by failing to provide him a fair process to seek DNA testing. This petition should be granted, the Nevada Supreme Court’s decision should be vacated, and the case should be remanded for further consideration in light of this Court’s decision in *Reed*.

#### **I. The Nevada State Courts Arbitrarily Deprived Middleton of a Procedural Vehicle in Which to Prove His Claim of Innocence.**

While legitimate state interests in comity and finality generally justify the existence of state procedural bars, these principles must sometimes “yield to the imperative of correcting a fundamentally unjust incarceration.” *Engle v. Isaac*, 456 U.S. 107, 135 (1982). As such, a federal habeas petitioner may present constitutional claims that are untimely, successive, or otherwise procedurally barred where a denial of due process at trial has “probably resulted in the conviction of one who is actually innocent.” *Murray v. Carrier*, 477 U.S. 478, 480 (1986). A procedural innocence claim requires a threshold showing of innocence that entitles the petitioner to discovery and an evidentiary hearing to determine if newly presented evidence makes it “more likely than not” that no reasonable juror would have been able to convict him beyond a reasonable doubt upon an evaluation of the complete evidentiary record. *Schlup*, 513 U.S. at 327. Once a petitioner passes through this “actual-innocence” gateway, he is permitted to present procedurally barred constitutional claims for consideration on the merits.

In *Berry*, the Nevada Supreme Court, like many other state courts, adopted this actual-innocence gateway standard entitling a habeas petitioner to raise procedurally defaulted claims if he is able to show that the failure to consider such claims would “amount to a fundamental miscarriage of justice.” 131 Nev. at 966; Nev. Rev. Stat. § 34.800(1)(b). In the years since his trial, Mr. Middleton has accumulated a considerable body of evidence that comprises compelling claims of prosecutorial and police misconduct and challenges the validity of his conviction. Mr. Middleton has presented this evidence in support of an actual-innocence gateway claim so that his underlying constitutional claims may be heard on the merits. Despite this, the Nevada state courts have dismissed Mr. Middleton’s constitutional claims as procedurally barred without granting discovery or an evidentiary hearing on his actual-innocence gateway claim.

Prior decisions of this Court make clear that an evaluation of the total record for the purposes of a procedural innocence claim includes both evidence that was presented at trial and that which was inadmissible, exculpatory evidence introduced in the present and any prior habeas petitions, and any evidence which may “call into question the credibility of the witnesses presented at trial.” *Schlup* 513 U.S. at 330. Nevada, too, requires a district court to “examine the evidence that led to the original conviction” and consider whether the new evidence, combined with any additional exculpatory evidence produced in prior habeas petitions, “diminishes the strength of the evidence presented at trial.” *Berry*, 131 Nev. at 1159.

However, rather than considering Mr. Middleton’s new evidentiary claims in their totality as required by binding federal and Nevada precedent, the Nevada Supreme Court considered each claim individually against only the evidence presented by the State at trial; the Nevada Supreme Court also failed to acknowledge evidence Mr. Middleton had presented in his prior post-conviction habeas petitions that was exculpatory and undermined the strength of the evidence purportedly connecting him to Davila.

Because Mr. Middleton’s procedural innocence claim is accompanied by an assertion of constitutional error at trial, his conviction is not entitled to the “same degree of respect as one that is the product of an error-free trial.” *Schlup*, 513 U.S. at 853. As such, this type of procedural innocence claim requires a lower threshold showing than a free-standing claim of factual innocence. This Court has made clear that a colorable showing of actual innocence does not require “definitive, affirmative proof of innocence.” *Larsen v. Soto*, 742 F.3d 1083, 1096 (9th Cir. 2013). Rather, a petitioner’s new evidence must be “sufficient to undermine a court’s confidence in his conviction” but need not “erase any possibility of guilt.” *Id.* at 1096. Passing through the *Schlup* gateway is not itself a basis for relief and does not create a free-standing innocence claim; instead, relief for the petitioner depends entirely upon the validity of the underlying constitutional claim asserted. Only by considering the totality of the evidence can a court accurately consider whether an aggregation of exculpatory evidence can “diminish[] the strength of the evidence presented at trial” and properly determine whether to grant discovery and an evidentiary hearing. *Id.*

Mr. Middleton’s evidentiary proffer exceeds the threshold of a procedural innocence claim. Defendants in criminal cases are entitled to discovery “where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.” *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997) (quoting *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995)). Further, where discovery is “necessary to fully develop the facts of a claim,” a court’s denial of discovery amounts to an abuse of discretion. *Id.*

Mr. Middleton has presented a wealth of exculpatory evidence, the totality of which undermines the circumstantial evidence connecting him to Davila. The prosecution connected Mr. Middleton to Davila through the pink plaid blanket, clothing items, and two strands of hair. However, Mr. Middleton has presented evidence that undermines each of these pieces of evidence. He proffered video evidence that proved the pink plaid blanket was in his possession prior to moving to Reno and at trial the prosecution was unable to present any reliable testimony that the blanket belonged to Davila. Recent DNA results concluded that clothing found in Mr. Middleton’s storage locker belonged to his ex-wife Haley, not Davila. However, the court refused to allow Mr. Middleton to prove through forensic analysis that none of the clothing from his storage locker was Davila’s. The hair on the duct tape was not discovered and reported until law enforcement obtained Davila’s hairbrushes. The hair on the pink and purple plaid blankets were mishandled and misidentified by law enforcement. Testimony that Mr. Middleton

was seen outside Davila's apartment was impeached, and the State has withheld evidence of the six-pack photo array within which he was allegedly identified. Finally, there was no evidence that Mr. Middleton was ever seen with Davila prior to her disappearance.

The Nevada Supreme Court improperly refused to consider the exculpatory evidence presented in prior state habeas proceedings, improperly excluding this evidence because it was not "new evidence."<sup>63</sup> However, Mr. Middleton is not required to show that *every* piece of evidence that exonerates him of the Davila offense is new. Rather, pursuant to *Schlup* and *Berry*, the court was required to consider all evidence developed from trial through Mr. Middleton's habeas petitions to properly consider his procedural innocence claim. The court's decision to either overlook or exclude from consideration this exculpatory evidence from Mr. Middleton's prior habeas proceeding was improper.

Mr. Middleton was arbitrarily denied the opportunity for the discovery and evidentiary hearing to which he was entitled. The judgment of the Nevada state courts rested on an improper application of federal precedent and constitutes a violation of Mr. Middleton's right to procedural due process.

## **II. The Process by Which the Nevada Supreme Court Evaluated Mr. Middleton's Request for DNA Testing Violated His Right to Due Process.**

Further, the Nevada state courts acted arbitrarily in their refusal to grant Mr. Middleton's request for the withdrawal and forensic analysis of evidence in his

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<sup>63</sup> App. A at 6.

case. In doing so, they arbitrarily denied him the post-conviction procedures to which he was entitled under state law in violation of his right to procedural due process.

As in *Reed*, Mr. Middleton's procedural due process claim is based on the inadequacy of the state post-conviction relief procedures available to him. Because these statutes constitute a state-provided procedure by which to obtain relief, they create a "liberty interest" subject to procedural due process. Mr. Middleton has a "liberty interest" in demonstrating his innocence with new evidence under state law. *Reed*, 598 U.S. at 236. When Mr. Middleton attempted to use this state-provided procedure for obtaining post-conviction access to DNA testing, the Nevada state courts arbitrarily applied the requirements of Nev. R. App. P. 12A which has precluded him from testing key trial evidence that would help to establish his innocence. Therefore, as applied in his case, Nev. R. App. P. 12A violates fundamental constitutional principles of due process, in violation of the Fourteenth Amendment.

The Nevada Supreme Court held the proper method by which Mr. Middleton could withdraw the materials for forensic analysis was under Nev. R. App. P. 12A. Mr. Middleton followed this procedure as directed; however, the district court concluded that it lacked the jurisdiction to issue an indicative ruling in order to facilitate a limited remand under Nev. R. App. P. 12A. Consequently, this statute does not provide an adequate legal process by which to seek relief, in violation of procedural due process.

The Nevada Supreme Court’s reasoning to deny Mr. Middleton’s request was arbitrary and capricious. The court found Mr. Middleton waited until after he filed his notice of appeal from the district court’s order denying his post-conviction habeas petition before seeking leave to conduct testing. However, Mr. Middleton did not have a reason to file the motion earlier. Indeed, the State was granted leave to withdraw the exact evidence that Mr. Middleton seeks to test, Exhibit No. 164A, for the purposes of DNA analysis; the trial court explicitly ordered that forensic testing; and the State assured Mr. Middleton that the analysis occurred. Mr. Middleton’s reliance on the State’s representations to the Nevada courts does not constitute a delay in filing his request for DNA testing. Once Mr. Middleton learned that the State failed to subject Exhibit No. 164A to forensic testing, he timely sought permission to perform his own DNA testing by filing a motion with the district court and a motion with the Nevada Supreme Court seeking a limited remand to pursue testing. Additionally, Mr. Middleton followed the suggestion of the Nevada Supreme Court’s order denying remand to seek an indicative ruling from the district court pursuant to Nev. R. App. P. 12A.

Further, the Nevada Supreme Court’s statement that Mr. Middleton “did not assert any claims or good cause based on new evidence as a result of genetic marker testing” additionally illustrates the degree to which the state-provided process has been arbitrary and Mr. Middleton has been denied due process. The exculpatory evidence that came to light based on the State’s forensic testing of Exhibit No. 164 (i.e., that the clothing belonged to Haley and not Davila) was not available until

after the appeal was docketed and Middleton's opening brief had been filed, because the State did not provide Mr. Middleton with the DNA report until after that time. Additionally, Mr. Middleton did not learn that the State failed to test Exhibit No. 164A until he received the report from the State in August of 2021. Mr. Middleton could not assert any new claims or good cause based on evidence that he did not have at the time he filed his opening brief. Once Mr. Middleton obtained the exculpatory results for the clothing in Exhibit No. 164 and discovered that the State did not test Exhibit No. 164A, he filed a motion for limited remand with the Nevada Supreme Court, sought an indicative ruling from the district court under Nev. R. App. P. 12A, and filed a petition for writ of mandamus with the Nevada Supreme Court so that he could present claims of good cause based on new evidence that was the result of the DNA testing.

The construction of the process by which DNA testing was denied by the Supreme Court of Nevada is unconstitutional and circular. It should be remanded in light of this Court's decision in *Reed*. Mr. Middleton is entitled to conduct DNA testing of Exhibit No. 164A, which the State has utilized over the last 30 years as key evidence in their efforts to link Davila and Mr. Middleton. Under its statute, the Nevada state courts should grant Mr. Middleton's request for forensic analysis of Exhibit No. 164A because such genetic marker analysis was ordered by the court at the request of the State and never conducted. The state courts' failure to do so represents an arbitrary denial and an unconstitutional violation of Mr. Middleton's right to procedural due process.

This Court's intervention is required to ensure that an arbitrary and inadequate state process does not result in the manifest injustice of the execution of an innocent man. This Court has acknowledged that it is no mere matter of discretion but instead "the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. 286, 300 (1969). Mr. Middleton is entitled to conduct DNA testing on material items of evidence in his case, and he deserves formal discovery and an evidentiary hearing on his procedural gateway claim of actual innocence.

The decision of the Nevada Supreme Court to deny Mr. Middleton's petition for writ of habeas corpus was an arbitrary misapplication of law, a denial of justice, and a deprivation of the due process to which Mr. Middleton is constitutionally guaranteed. A resolution of these issue is necessary to provide uniformity between the states and federal courts in the protection of due process for those who assert their innocence.

### **CONCLUSION**

For the foregoing reasons, Mr. Middleton respectfully requests that this Court grant his petition for writ of certiorari and vacate the judgment of the Nevada Supreme Court. In the alternative, Mr. Middleton requests that this Court grant certiorari, vacate the judgment of the Nevada Supreme Court, and remand for

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further consideration in light of this Court's decision in *Reed v. Goertz*, 598 U.S. 230 (2023).

Dated this 14th day of September, 2023.

Respectfully submitted,

Rene L. Valladares  
Federal Public Defender

/s/ David Anthony  
David Anthony  
*Counsel of Record*  
Assistant Federal Public Defender  
411 E. Bonneville, Ste. 250  
Las Vegas, Nevada 89101  
(702) 388-6577  
David\_Anthony@fd.org

Counsel for Petitioner