

No. 23-5611

IN THE SUPREME COURT OF THE UNITED STATES

October 19, 2023

DAVID STEPHEN MIDDLETON, *Petitioner*,

v.

WILLIAM GITTERE, Warden, *Respondent*
AARON FORD, ATTORNEY GENERAL,
STATE OF NEVADA,

***ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA***

RESPONDENT'S BRIEF IN OPPOSITION

CAPITAL CASE

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QUESTIONS PRESENTED

CAPITAL CASE

1. Where Middleton based his gateway claim of actual innocence exclusively on arguments previously considered and rejected by the Nevada Supreme Court on the merits, was the Nevada Supreme Court required to reconsider the same claims again, and to ignore Nevada statutory authority regarding discovery in post-conviction matters?
2. Where Middleton opposed genetic marker testing at the district court proceedings reviewed by the Nevada Supreme Court, changed his mind after filing his appeal, failed to follow processes regarding limited remand, never pursued genetic marker testing via the appropriate Nevada statute, and may still pursue testing following resolution of his petition, has he been denied procedural due process?

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STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Appellant David Stephen Middleton (hereafter “Middleton”) was convicted of the murders of Katherine Powell and Thelma Davila on September 18, 1997. His direct appeal was denied by the Nevada Supreme Court. *See Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998). His first habeas petition was denied in 2003, but after his first post-conviction attorney, Bruce Lindsay, failed to comply with court deadlines, the Nevada Supreme Court remanded the case back to the district court for the appointment of new habeas counsel and further proceedings. *See Middleton v. Warden*, 120 Nev. 664, 98 P.3d 694 (2004). Middleton’s second petition was filed in 2005. After dismissing some claims, the district court held an

evidentiary hearing, and ultimately denied those remaining claims; its decision was affirmed on appeal.

Middleton's third petition was filed on September 16, 2009. The State moved to dismiss the petition as untimely and successive, without good cause to excuse procedural bars. The district court agreed and dismissed the petition. That decision was ultimately affirmed. *Middleton v. State*, 125 Nev. 1061, 281 P.3d 1201 (Table) (2009).

Middleton filed his fourth petition on August 18, 2014. 12 AA 2879-2937. Contemporaneously, Middleton appealed the denial of his third habeas attempt. During the pendency of that appeal, he made various allegations about former Deputy District Attorney Joseph Plater and a purported conflict of interest in the litigation. The case was remanded to district court on that issue only, and the parties then continued litigating the specious conflict of interest allegations for years. Ultimately, the Nevada Supreme Court ordered that Deputy District Attorney Joseph Plater (now retired) be screened from the case, but found that the Washoe County District Attorney's Office could remain on the case. Undeterred, Middleton sought to disqualify the Washoe County District Attorney (hereafter "WCDA") again on the same basis. After an evidentiary hearing regarding the adequacy of the WCDA's ethical screen, the district court found no cause to disqualify the WCDA. Middleton then sought relief from the Nevada Supreme Court, who affirmed the district court's decision. *Middleton v. Second Judicial District Court in and for County of Washoe*, 135 Nev. 687, 449 P.3d 854 (Table)(2019).

During the protracted pendency of the appeal regarding the third petition, the State moved to withdraw two exhibits for the purpose of forensic testing various items in connection to unsolved murders of women in Nevada, Colorado, and Florida. In 2016, the Nevada Supreme Court affirmed the district court's denial of the third habeas petition. *Middleton v. McDaniel*, 132 Nev. 1007, 386 P.3d 995 (Table)(2016). Middleton also petitioned the Nevada Supreme Court for mandamus review of the district court's ruling on Middleton's 2018 attempt to have the WCDA's office removed from the case. The Nevada Supreme Court denied the petition for writ of mandamus. *Middleton v. Second Judicial District Court in and for County of Washoe*, 135 Nev. 687, 449 P.3d 854 (Table)(2019).

Following the district court's denial of the third petition, Middleton appealed to the Nevada Supreme Court, which affirmed the district court's decision. *Middleton v. Gittere*, 521 P.3d 55 (Table)(Nev. 2022)(unpublished).

II. FACTS UNDERLYING THE CONVICTION

In 2009, the Nevada Supreme Court succinctly summarized the facts supporting Middleton's 1998 conviction:

Katherine Powell's murder

At around 9:30 p.m. on February 11, 1995, Katherine Powell's body was found in a trash dumpster at a Reno apartment complex. She was last seen alive on February 3, 1995. Her body was contained in a sleeping bag and covered by plastic garbage bags. A large yellow plastic bag covered the sleeping bag. Her body was also loosely bound by rope and, aside from a black tank top and blue socks, she was nude. Powell's autopsy revealed bruises on her elbows and knees; most of the bruises were incurred prior to death. She had likely been dead for at least two days. Microscopic analysis of sections of the left ventricle of her heart exhibited some fibrosis and acute cell death; the latter occurred a few days before death. Although forensic pathology

investigation revealed the manner of death was homicide, the cause of death could not be conclusively determined.

Physical evidence obtained during the autopsy was later linked to Middleton. Bite marks were found on Powell's left breast and had been inflicted by Middleton before Powell died. A semen stain found on her right thigh was also matched to Middleton.

Investigation after Powell's body was found indicated that she was taken from her home and pointed toward the involvement of Middleton and his girlfriend, Evonne Haley. In particular, two of Powell's neighbors noticed a pickup truck, resembling Middleton's truck, parked in front of Powell's home early in the morning on Saturday, February 4, 1995. A third neighbor had noticed that a TCI Cable truck was parked in front of Powell's home a few days earlier on February 1. This neighbor later identified the occupants as Middleton and Haley. Police also determined that Middleton was the TCI Cable technician who had made a service call at Powell's home on January 28, 1995.

Additionally, after hearing of Powell's disappearance, a friend entered her home and noticed various items were missing, including a phone, a camera, a FAX machine, and a laptop computer and printer. In the kitchen, he found two condoms and a wad of duct tape.

On February 5, a person used Powell's credit card to purchase a \$1,900-piece of stereo equipment by telephone from the Good Guys store in Reno. The next afternoon, Haley arrived at the store to pick up the equipment. One employee's description of the truck she drove led the police to Middleton's pickup.

About one month later, an anonymous caller informed the police that Middleton and Haley had a storage unit, which the police searched pursuant to a warrant and recovered evidence linking Middleton to Powell's death. Police officers recovered the stereo equipment purchased from Good Guys and Powell's house and car keys, camera, computer, printer, and other personal property. The police also found a box of yellow plastic bags and a box of garbage bags. One of three yellow bags was missing from the first box, as were some garbage bags from the second. Police officers also discovered a refrigerator lying on its back and blue fibers, similar to fibers found on Powell's body, inside the refrigerator. The refrigerator's shelves had been removed, the floor of its freezer compartment had been cut and folded down to make one space, and two air holes had been drilled in it. The police also found a switchblade knife, a stun gun, a foam ball with

apparent teeth marks, and rope similar to that used to bind Powell's body. Other incriminating evidence collected included the following: orange-handled tension clamps, hair and fiber from one of the clamps, black canvas belts with Velcro, black wire ties, handcuffs, condoms, partial rolls of duct tape, a large speaker box with a space behind the speaker about 14 inches deep, 30 inches wide, and 36 inches high, hairs and fibers from the speaker box, several blankets, and chains.

Thelma Davila's murder

On April 9, 1995, about one month after the search of Middleton's storage unit and two months after the discovery of Powell's body, a man walking with his dog in a secluded area near Verdi found a human skull and other remains. A matted hairpiece was found with rope in it; the rope was the same diameter as the rope found with Powell's body.

A medical examination of the remains did not disclose the cause of death, but the medical examiner could not rule out suffocation or other possible causes of death. A dental bridge in the skull led to the identification of the remains as those of Thelma Davila, who had disappeared eight months earlier, on August 8, 1994.

Davila's sister and a friend later identified a blanket, a black lacy top, and a red hair tie found in Middleton's storage unit as Davila's. Other evidence indicated that Davila, Haley, and Middleton may have had contact before her disappearance, including testimony that Davila was getting into a white or beige pickup truck on August 5, 1994, with a man and woman matching Haley's and Middleton's descriptions, that Middleton was seen using the pay phone at a dance club that Davila frequented, and that Davila had been seen with Haley at the restaurant where Davila was employed, a grocery store, and a medical complex.

Although TCI cable had been installed in Davila's apartment in June 1993 and serviced in July 1994, Middleton did not perform either service. Nonetheless, one of Davila's neighbors saw Middleton walk partway up the stairs leading to Davila's apartment and then come back down around 6:45 a.m. on August 8, 1994—the day that Davila was last seen alive. Middleton was not working that day.

Evidence relative to both murders

The timing of Middleton's leasing and usage of two storage units was consistent with the timing of the victims' disappearances.

Middleton first leased a storage unit in Sparks just over a month before Davila disappeared, under the name of Hal Data Research. The unit was five feet by ten feet in size. On the afternoon of August 8, 1994—the day that Davila was last seen alive—Middleton leased a larger unit and moved out of the smaller one. Storage facility records revealed that on Friday, February 3, 1995—the last day that Powell was seen alive—Middleton entered the facility at 2:13 a.m. and 8:06 p.m. Middleton entered the facility numerous times between February 3 and February 11, the day that Powell's body was found.

Analysis of evidence located in the larger storage unit connected Middleton to the murders. With respect to Powell: (1) fibers found in the refrigerator in the storage unit were indistinguishable from those found on Powell's body; (2) two human head hairs found in the refrigerator and one found on a black restraint belt could not be excluded as belonging to Powell; and (3) DNA obtained from a foam ball found in the storage unit matched Powell's DNA, as did DNA extracted from two hairs found in a clamp and one hair found on a blanket. With respect to Davila: (1) hairs found on a roll of duct tape and on two blankets in the storage unit were consistent with those found on Davila's hairbrush; and (2) DNA collected from one hair found on duct tape and one hair from another blanket matched Davila's DNA. Rope found with both bodies was the same type—common white, nylon, woven twelve-strand, one-quarter inch in diameter.

A medical examiner explained Powell's and Davila's autopsy results. In particular, he opined that despite mild perivascular fibrosis, Powell's heart was healthy and normal, countering Middleton's contention that Powell died from heart disease rather than a criminal agency. The circumstances of Powell's disappearance and the condition of her body when found signified that her death was a homicide and the lack of pathological findings indicated that she probably died of asphyxiation. Bruising on Powell's elbows and knees were consistent with struggles to free herself from a confined space, such as the refrigerator. An expert witness explained that based on the volume of the refrigerator and the size of the two holes drilled in it, a person measuring 5' 7" tall and weighing 145 pounds enclosed in the refrigerator would have died from oxygen deprivation in about three and a half hours. The medical examiner concluded that although the circumstances surrounding Davila's disappearance indicated that her death was a homicide, a cause of death could not be determined.

Middleton v. State, 125 Nev. 1061, 281 P.3d 1201 (2009)(unpublished).

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III. REASONS FOR DENYING THE PETITION

A. Middleton Did Not Present New Information or Evidence of Constitutional Violations at Trial, and Failed to Establish a Gateway Claim of Factual Innocence.

“[A] gateway claim requires ‘new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.’’ *House v. Bell*, 547 U.S. 518, 537 (2006)(quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). The Nevada Supreme Court appropriately found that Middleton’s arguments pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), which pertained to a forensic report regarding evidence recovered from a roll of duct tape and the preliminary hearing impeachment evidence about the individual who interpreted the preliminary hearing testimony of a witness who identified clothing seized from the storage unit as belonging to Davila, were insufficient to establish good cause and prejudice for the procedurally barred petition. The Nevada Supreme Court further found that the allegations did not establish actual innocence, and instead constituted re-arguments of claims raised in prior proceedings. *Middleton v. Gittere*, 521 P.3d 55 (Table)(Nev. December 2, 2022)(unpublished). The only new allegation was “based on a hoped-for conclusion that a forensic report exists that proves no hair was present on the duct tape when it was seized and that the report was withheld by the State...Such a speculative allegation could have been levelled at any time, even during trial, and does not amount to good cause.” *Id.* Middleton did not offer any

actual new evidence to support a gateway claim for factual innocence. He offered speculation instead.

1. Middleton's Allegations Regarding the Pink Blanket and Dora Valverde's Purported Intellectual Disability Had Been Previously Raised and Rejected in 2016, and Were Procedurally Barred by Nevada Statutory Law.

Middleton argues that the Nevada Supreme Court erred in rejecting his arguments regarding ownership of the pink plaid blanket and witness Dora Valverde's purported intellectual disabilities. But these claims constituted a time-barred abuse of the writ under Nevada statutes. *See* NRS 34.726 (1); NRS 34.810(1)(b)(2). This is because the same claims had been previously considered and rejected by the Nevada Supreme Court in 2016:

We conclude that the district court did not err in denying this claim. Middleton did not demonstrate that prior counsel could have raised a viable *Brady* claim concerning Valverde's purported learning disability. The State was not aware of Valverde's learning disability because it had not been discovered until she sought counseling after trial. Her inability to remember some of the events of years earlier did not put the State on notice that she had a cognitive disability. Therefore, Middleton's counsel could not demonstrate that impeachment evidence was withheld. *See Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

Even if Middleton could have introduced the aforementioned evidence, he did not demonstrate a reasonable probability that the result of the trial would have been different. *See id.* (providing that petitioner must demonstrate that withheld evidence was material under *Brady* to establish actual prejudice in a postconviction petition). Other witnesses identified the blanket and other property found in the storage unit belonging to Davila. Moreover, Davila and Haley were seen together several times before Davila's disappearance. Middleton was seen outside of Davila's apartment on the morning she disappeared and he moved into a larger storage unit later that day. Hair found in the unit was consistent with Davila; in particular, DNA recovered from hair found in the unit, other than hair recovered on the pink blanket, was consistent with Davila's DNA. Witnesses also

identified Davila's clothing, which was recovered from Middleton's unit. Davila's remains were accompanied by rope, which was consistent with rope found in the storage unit and used to bind Powell, and plastic similar to that used to cover Powell.

Middleton v. McDaniel, 132 Nev. 1007, 386 P.3d 995 (2016).

2. Middleton's Allegations Regarding the Preliminary Hearing Interpreter Lacked Merit, Had Been Available to Him Since 1997, and Were Properly Rejected.

Middleton alleged that Carlos Gonzalez, a court interpreter used only during the preliminary hearing testimony of Davila's sister, Dora Valverde, was a convicted sex offender who also sustained a perjury conviction prior to interpreting for Valverde. The Nevada Supreme Court observed that the claim was untimely raised without good cause or prejudice, because information regarding Gonzalez was publicly available at the time of Middleton's trial, and had been available to Middleton since 1997. It also explained that notwithstanding the procedural time bars, Middleton had failed to demonstrate prejudice or a *Brady* violation:

Information about Gonzalez's prior conviction was publicly available at the time of Middleton's trial in 1997. Middleton thus cannot demonstrate good cause for his delay in raising a claim based on that information. See *Hathaway*, 119 Nev. at 252, 71 P.3d at 506 (noting that good cause exists if an impediment external to the defense prevented compliance with state procedural rules, including because the legal or factual basis of the claim was not reasonably available). More importantly, Middleton fails to demonstrate prejudice or a *Brady* violation because the information about Gonzalez is not material to guilt or punishment. See *Huebler*, 128 Nev. at 198, 275 P.3d at 95 (explaining that the third prong of a *Brady* violation requires a showing that the evidence is material to guilt or punishment, which parallels the prejudice showing required to excuse a procedural bar). Valverde testified at trial through a different interpreter, and her trial testimony about discovering Davila missing and identifying Davila's property was consistent not only with her preliminary hearing testimony but also with her earlier statements to police. Her identification of Davila's clothing was also consistent with another

witness's testimony. Thus, evidence impeaching Gonzalez's translation of Valverde's preliminary hearing testimony would have had little effect on the jury's weighing of Valverde's credibility or its guilty verdict. For the same reasons, Middleton cannot meet the actual-innocence test based on the information about Gonzalez. Therefore, the district court did not err in denying this claim as procedurally barred.

Middleton v. Gittere, 521 P.3d 55 (Table)(Nev. 2022)(unpublished).

3. Middleton's Claims Regarding the Hair Fiber Evidence and Forensic Report Were Previously Raised and Rejected, and Procedurally Barred Pursuant to Nevada Statutory Law.

The Nevada Supreme Court appropriately found that Middleton's arguments pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), which pertained to a forensic report regarding evidence recovered from a roll of duct tape and the preliminary hearing impeachment evidence about the individual who interpreted the preliminary hearing testimony of a witness who identified clothing seized from the storage unit as belonging to Davila, were insufficient to establish good cause and prejudice for the procedurally barred petition. The Nevada Supreme Court further found that the allegations did not establish actual innocence, and instead constituted re-arguments of claims raised in prior proceedings. *Middleton v. Gittere*, 521 P.3d 55 (Table)(Nev. December 2, 2022)(unpublished). Such untimely, successive, and abusive claims are statutorily barred in Nevada. *See* NRS 34.726 (1); NRS 34.810(1)(b)(2).

4. The Nevada Supreme Court Properly Found That Middleton Was Not Entitled to Discovery Pursuant to State Statute.

In Nevada, a party seeking to engage in discovery on a post-conviction petition for habeas corpus must first overcome applicable procedural bars and allege facts sufficient to warrant an evidentiary hearing. Even then, the district court has

broad discretion whether to allow discovery. *See* NRS 34.780. Here, Middleton's claims were procedurally barred because they were untimely, successive, and abusive. The Nevada Supreme Court concluded that the district court's denial of evidentiary hearing and discovery was proper:

As discussed above, Middleton did not allege sufficient facts, even if proven at an evidentiary hearing, to avoid the procedural bars. As such, he did not demonstrate good cause to conduct discovery. See NRS 34.780(2) ("After the writ has been granted and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so.")

Middleton v. Gittere, 521 P.3d 55 (Table)(Nev. December 2, 2022)(unpublished).

5. Middleton Failed to Follow Nevada Statutory Process and Appellate Procedures in Seeking Additional DNA Testing and Limited Remand, and His Due Process Rights Were Not Violated.

For at least half a decade, Middleton vociferously opposed the State's efforts to withdraw exhibits for additional evidentiary testing to see if they might connect Middleton to murders in other states. The State began pursuing permission to have the items tested in 2014, and for at least five years, Middleton both directly opposed the State's request and prevented the district court from ruling on the motion due to his dilatory pursuit of previously decided issues in the Nevada Supreme Court.

By suggesting that he was pursuing DNA testing of DNA items all along, Middleton attempts to rewrite the undisputed procedural history of this case. Middleton opposed retesting, ostensibly because he had reason to believe that the results might indeed connect him to additional murders. It was only after the Washoe County Forensic Science Division's report reflected that Middleton's DNA

had not been found that Middleton accused the State of some sort of nefarious motive with respect to the scope of the testing. It bears repeating that the district court's order did not require additional testing on all items booked under Exhibits 164 and 164A; it merely granted the State leave to access the exhibits and conduct testing. 18-AA-04341. Many items were tested, as reflected in the Washoe County Forensic Science Division's report.

Because the additional testing conducted by the State did not yield conclusive results, Middleton advanced an argument on direct appeal not presented to or considered by the district court below in its decision to dismiss the petition. He claimed that additional testing would lend credence to his gateway claim of actual innocence. This dubious claim would have been available to Middleton during the prior proceedings had he not opposed the State's motion to conduct testing below.

Moreover, the absence of Davila's DNA on the recently tested items is not exculpatory. The absence of Davila's DNA on any item, over two decades after Middleton murdered her, does not contradict any evidence presented at trial. It would not change the overwhelming evidence presented at trial connecting Middleton to Davila's murder. Additionally, Nevada has a specific statute permitting convicted persons to seek genetic marker testing. *See* NRS 176.0918. Middleton never sought DNA testing under this statute.

In denying Middleton's related petition for writ of mandamus, the Nevada Supreme Court observed that Middleton waited two years after filing his notice of appeal regarding his habeas petition before moving to withdraw the exhibits. It concluded, appropriately, that the district court did not abuse its discretion by

finding it lacked jurisdiction to entertain the motion. It further observed that Middleton failed to make the showing required to obtain a limited remand, and he did not follow the procedural process necessary to seek it. *Middleton v. Second Judicial District Court in and for County of Washoe*, 20 P.3d 826 (Nev., December 8th, 2022)(unpublished).

Middleton argues that his due process rights were violated by Nev. R. App. P. 12A because his motion to seek evidentiary testing was denied based on a lack of jurisdiction. This argument ignores that 1) Middleton fought evidentiary testing in the habeas proceedings below for years; and 2) NRS 176.0918 provides a specific procedure for Middleton to seek evidentiary testing. Middleton has had ample opportunity to seek evidentiary testing, but he never used available processes to pursue it during the habeas proceedings. Instead, he waited for the case to be pending on appeal, and did not make the showing required to obtain a limited remand. There is no date currently set for Middleton's execution. Following the resolution of the instant petition, the district court will again have jurisdiction. Middleton can seek evidentiary testing, and if he can demonstrate the results are exculpatory, he can assert the same in another post-conviction petition for writ of habeas corpus. Genuinely exculpatory results could potentially constitute good cause to excuse the applicable procedural bars by supporting a gateway claim based on actual innocence.

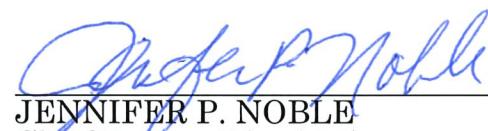
IV. CONCLUSION

Over the past 26 years, Middleton has filed a direct appeal, multiple petitions for habeas corpus and related appeals, and prior petitions for writ of certiorari. In

the most recent proceedings, the Nevada Supreme Court rejected his latest claims for relief because they were unmeritorious, untimely, and constituted an abuse of the writ pursuant to state law. To the extent that he has argued his right to due process has been violated regarding DNA testing, Middleton fought any testing at all for years; then, he declined to utilize a specific state statute governing genetic marker testing. He failed to follow the Nevada Rules of Appellate procedure in seeking limited remand. His assertion that no further remedies regarding testing are available to him is false.

WHEREFORE, the Respondent respectfully requests that certiorari be denied.

Respectfully submitted,



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