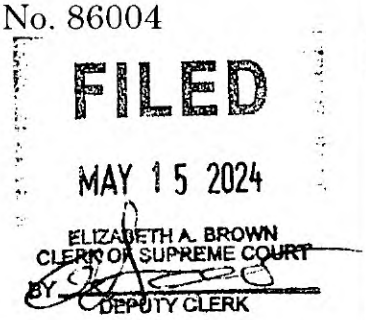
IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE DOW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86004



ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Andre Dow filed the instant postconviction petition, his second, on December 21, 2021, eleven years after the remittitur issued on direct appeal from the judgment of conviction. *Dow v. State*, No. 52583, 2010 WL 3276222 (Nev. May 26, 2010) (Order of Affirmance). Thus, Dow's petition was untimely, successive, and an abuse of the writ to the extent that the petition raised claims that could have been litigated in the prior petition. *See* NRS 34.726(1); NRS 34.810(1)(b)(2), (3)[1]; *Dow v. State*, No. 83271-COA, 2022 WL 2132312 (Nev. Ct. App. June 13, 2022) (Order of Affirmance); *Dow v. State*, No. 70410-COA, 2019 WL 2454077 (Nev. Ct. App. June 11, 2019) (Order Affirming in Part, Reversing in Part and Remanding) (remanding for evidentiary hearing to determine if good cause exists for delay in filing first postconviction petition).

[1]The subsections within NRS 34.810 were recently renumbered but not substantively amended. *See* A.B. 49, 82d Leg. (Nev. 2023). Here, we use the numbering in effect when the district court denied the postconviction petition.

Dow's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b), (4). Good cause "may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available" to be raised in a timely petition. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (internal quotation marks omitted). Prejudice requires a showing that errors caused actual and substantial disadvantage to the petitioner. *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012). We defer to the district court's factual findings if supported by substantial evidence and not clearly 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).

Dow argues that the district court erred in rejecting his claim that the prosecution did not disclose impeachment evidence regarding witness Antione Mouton, in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and that his recent discovery of that evidence constitutes good cause to excuse the procedural bars. At trial, Mouton testified to two conversations with Dow in Las Vegas. According to Mouton's trial testimony, during those conversations Dow implied he was involved in the murders of Jermaine Akins and Anthony Watkins in Las Vegas and Lee Denae Laursen in California. Dow asserts that the State did not disclose records showing that Mouton was known by other aliases, was detained in Georgia on the date the second conversation with Dow purportedly occurred, was a paid informant in other cases, and faced serious crimes in other jurisdictions. He further contends that the district court erred in not finding that the prosecution constructively possessed *Brady* material held by the FBI, San Francisco Police Department (SFPD), and law enforcement in Fulton County, Georgia.

"[T]here are three components to a *Brady* violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). Generally, showing that the State withheld evidence in violation of *Brady* parallels the good cause showing required to overcome procedural bars, *Mazzan*, 116 Nev. at 67, 993 P.2d at 37, and establishing that the evidence was material under *Brady* can demonstrate prejudice necessary to overcome the procedural bars, *id.*

Dow did not demonstrate at the evidentiary hearing that the prosecution withheld exculpatory evidence. Much of the evidence identified by Dow was available to the defense before trial. In a pretrial deposition, Mouton acknowledged that he pleaded guilty to federal charges of sex trafficking of a minor and was facing Nevada state charges of burglary and forgery. Mouton also admitted to using multiple aliases. And Dow did not elicit credible evidence to substantiate the allegation that Mouton had been a paid informant for the FBI, and thus failed to demonstrate any such evidence was withheld.

Dow also did not demonstrate that any information about Mouton held by the FBI, SFPD, or authorities in Fulton County, Georgia, was in the State's constructive knowledge and possession. For purposes of *Brady*, "the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers," *Jimenez v. State*, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996) (quoting *Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992)), even if that evidence was not disclosed to the prosecutor, *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006). According to the record, the SFPD

apprehended Dow in response to the Nevada investigation; it had also apprehended Dow's codefendant when he was detained during a separate incident. Dow did not demonstrate that SFPD officers otherwise assisted in the Nevada murder investigation or developed evidence to prosecute Dow, particularly any evidence related to Mouton. The record indicates that the FBI coordinated with Fairfield, California police investigating Laursen's murder and a possible connection to Mouton. But it appears that the FBI's assistance was limited to the Laursen murder investigation in California and did not extend to the investigation of Akins' and Watkins' deaths. Instead, Fairfield police took Mouton's statement regarding the Las Vegas investigation and forwarded it to the prosecution. Considering these agencies' tangential relationship to the Las Vegas investigation, the district court did not err in concluding that the prosecution was not in constructive possession of any evidence in the possession of the SFPD or FBI. As to the Fulton County authorities, the record does not contain any evidence suggesting that they participated in Dow's prosecution or that the prosecutor knew Mouton had been detained in Fulton County. Thus, the prosecution could not be deemed to have known that Mouton had been detained there and to be in constructive possession of the Fulton County jail records.

Finally, Dow did not demonstrate that any evidence upon which the *Brady* claim is based was material. Specifically, Dow did not show that any new evidence would have impeached Mouton's trial testimony or that there was a reasonable probability of a different result at trial had Mouton been impeached. Despite Dow's insistence, Mouton did not testify that the December 2005 meeting with Dow occurred on December 5, a date Mouton was detained in Georgia; instead, that specific date was stated by the

prosecution during the deposition and trial, likely by mistake. Thus, Dow did not demonstrate that Mouton's testimony would have been significantly undermined had the Fulton County, Georgia, custody record been available. Further, as observed by the Court of Appeals on direct appeal, there was sufficient evidence of Dow's guilt apart from Mouton's testimony. *Dow*, No. 83271-COA, 2022 WL 2132312, at *2. Trial testimony established that Dow invited the victims to Las Vegas under the guise of furthering their music careers. *Id.* Dow was seen with Watkins and Akins by a witness and on casino surveillance hours before they were killed. *Id.* Watkins and Akins were found in and near a vehicle belonging to Dow's girlfriend, Tanisha Aaron, and Laursen's car was seen fleeing the scene of the shooting. Evidence also indicated that Dow killed Laursen in California shortly after learning he had been indicted. Dow even wrote rap lyrics referencing the murders. *Id.*

Because the *Brady* claims lacks merit, Dow did not demonstrate good cause and prejudice to excuse the procedural default. NRS 34.726(1); NRS 34.810(1)(b)(2), (3), *Mazzan*, 116 Nev. at 67, 993 P.2d at 37. The district court therefore did not err in rejecting this claim.

Second, Dow argues that the district court erred in not considering Lateef Gray an expert witness on a prosecutor's obligations pursuant to *Brady*. We disagree.

Gray, a licensed attorney, worked both in criminal defense and criminal prosecution and oversaw an office charged with addressing *Brady* claims. His education and experience suggest he may possess specialized knowledge about *Brady* claims. *See Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008) (considering an expert's "(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4)

practical experience and specialized training[,]" in determining whether they possess the specialized knowledge to testify as an expert). But the trier of fact at the evidentiary hearing had comparable education and experience with *Brady* claims. Thus, it was unlikely that Gray's specialized knowledge would assist the trier of fact in understanding the evidence and applying the law to that evidence. *See id.* at 498, 189 P.3d at 650 (requiring expert testimony to assist the trier of fact's understanding of evidence and determination of facts in issues). Moreover, even though the district court did not qualify Gray as an expert, the court did not prohibit him from expressing an opinion as to whether certain evidence should have been disclosed. Accordingly, the district court did not abuse its discretion in denying the request. *Mulder v. State*, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000); *see Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987) ("The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.").

Third, Dow argues that the district court's findings regarding the credibility of Mouton's April 20, 2022, declaration and testimony at the evidentiary hearing are not supported by the record. Dow contends that there is no evidence to support the conclusion that Dow's podcast on April 18, 2022, motivated the recantation and ignores other detailed and consistent testimony.

Courts generally view recantations with suspicion. *See Callier v. Warden*, 111 Nev. 976, 989-90, 901 P.2d 619, 627 (1995) (collecting cases). To obtain relief based on Mouton's recantation, Dow had to demonstrate that Mouton's trial testimony was material and false; the recantation was newly discovered and could not have been discovered through reasonable

diligence; and that he would not have been convicted had Mouton not testified at trial. *See id.* at 990, 901 P.2d at 627-28. Dow did not meet this burden.

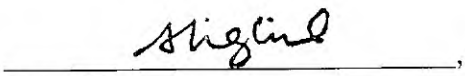
The district court found Mouton's evidentiary hearing testimony, during which he asserted that his trial testimony was false, not credible. According to the record, Mouton did not recant until over a decade after he testified at trial. And Mouton recanted only days after Dow broadcast and published information online identifying Mouton and accusing him of lying at trial and Mouton's father confronted Mouton about his testimony after reading articles online. The district court properly considered the timing of Mouton's recantation in relation to the publication of the podcast and articles disparaging Mouton's testimony. *See Gable v. Williams*, 49 F.4th 1315, 1323 (9th Cir. 2022) (considering the timing, context, original trial testimony, and other evidence to determine the weight to afford a recantation). And based on that timing, the district court could properly infer that the online publication prompted Mouton's recantation. Additionally, Mouton could not recall details of who assisted in preparing the declaration recanting his testimony and why the declaration mentioned certain dates. Lastly, the district court observed Mouton while he testified and concluded that his demeanor did not evoke trustworthiness. *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"); *see also Ybarra v. State*, 127 Nev. 47, 58, 247 P.3d 269, 276 (2011) ("Matters of credibility . . . remain . . . within the district court's discretion."). Considering these circumstances, the district court's conclusion that Mouton's evidentiary hearing testimony was not credible and therefore that

Dow did not demonstrate Mouton's trial testimony was false is supported by substantial evidence. Further, as there was significant other evidence besides Mouton's testimony supporting the verdict, Dow did not demonstrate that he would not have been convicted but for Mouton's testimony. *See Callier*, 111 Nev. at 990, 901 P.2d at 627-28. Accordingly, the district court did not err in denying this claim.

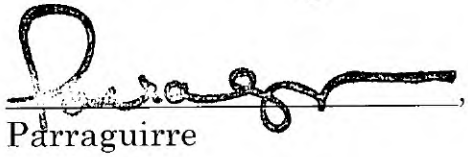
Fourth, Dow argues that the district court should have permitted Dow to treat Mouton as an adverse witness and to examine Mouton with leading questions. We discern no abuse of discretion. *See* NRS 50.115(3)(a) ("Leading questions may not be used on the direct examination of a witness without the permission of the court."); *Leonard v. State*, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001) (reviewing court's decision on request to use leading questions for abuse of discretion). Mouton executed a declaration in support of Dow's postconviction petition and testified at the evidentiary hearing when called by Dow. Mouton's responses were not evasive, ambiguous, or combative. *See Thomas v. Cardwell*, 626 F.2d 1375, 1386 (1980) (permitting hostile witness treatment where responses "were evasive, ambiguous and definitely in conflict with his prior statements in two previous court proceedings"); *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 12-13 (1st Cir. 1993) ("A 'hostile' witness, in the jargon of evidence law, is not an adverse party but a witness who shows himself or herself so adverse to answering questions, whatever the source of the antagonism, that leading questions may be used to press the questions home."). The district court's decision declining to treat Mouton as adverse to Dow is supported by the record. Additionally, the court gave Dow considerable leeway to ask leading questions about the content of Mouton's declaration.

Having considered Dow's contentions and having concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Stiglich


_____, J.
Pickering


_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Chesnoff & Schonfeld
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk