

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GEORGE W. LUSTER, JR.,  
Appellant,  
vs.  
CHARLES DANIELS, DIRECTOR  
NEVADA DEPARTMENT OF  
CORRECTIONS,  
Respondent.

No. 81539-COA

**FILED**

**MAY 20 2021**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

George W. Luster, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 18, 2020. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Luster filed his petition more than 20 years after issuance of the remittitur on direct appeal on January 25, 2000. *See Luster v. State*, 115 Nev. 431, 991 P.2d 466 (1999). Thus, Luster's petition was untimely filed. *See* NRS 34.726(1). Moreover, Luster's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous

petitions.<sup>1</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Luster's petition was procedurally barred absent a demonstration of good cause and actual prejudice, see NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3), or that he was actually innocent such that it would result in a fundamental miscarriage of justice were his claims not decided on the merits, see *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). Further, because the State specifically pleaded laches, Luster was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

First, Luster claimed he could overcome the procedural bars because the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, he claimed the State withheld or destroyed the "kidnap note" and withheld the expert report and attachments regarding the handwriting analysis of the note. A valid *Brady* claim can constitute good cause and prejudice sufficient to excuse the procedural bars. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) ("[P]roving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice."). However, a *Brady* claim raised in a procedurally barred petition "still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense." *State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012).

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<sup>1</sup>*Luster v. State*, Docket No. 70978-COA (Order of Affirmance, February 23, 2017); *Luster v. State*, Docket No. 56231 (Order of Affirmance, March 18, 2011); *Luster v. State*, Docket No. 46872 (Order of Affirmance, July 5, 2006).

Luster knew at the time of trial that the note was either not provided to the defense or was destroyed. Thus, he failed to demonstrate he raised this claim within a reasonable time. Further, Luster already raised the alleged failure to disclose the expert's report as good cause in a previous petition. This court rejected that good cause claim because the report was provided to counsel prior to trial. *Luster v. State*, Docket No. 70978-COA (Order of Affirmance, February 23, 2017). Thus, this portion of the claim was barred by the doctrine of the law of the case. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). To the extent Luster claimed the attachments to the report were not included with the report, he failed to demonstrate these attachments were material.

Second, Luster claimed the allegedly withheld evidence discussed above demonstrated he was actually innocent of kidnapping. To prove actual innocence as a gateway to reach procedurally barred constitutional claims of error, a petitioner must show "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018).

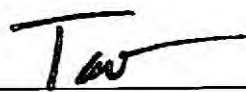
The Nevada Supreme Court previously concluded that, even had the contents of the note not been introduced at trial, there was sufficient other evidence of Luster's guilt presented at trial. *See Luster v. State*, Docket No. 46872 (Order of Affirmance, July 5, 2006). Thus, Luster failed to demonstrate that having the note, or the handwriting expert report

regarding the note, would have resulted in no reasonable juror convicting him in light of this evidence.

Finally, Luster failed to overcome the presumption of prejudice to the State. For the foregoing reasons, we conclude the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Chief Judge, Eighth Judicial District Court  
Eighth Judicial District Court, Dept. Five  
George W. Luster, Jr.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>2</sup>Because Luster did not request the appointment of counsel, we conclude the district court did not abuse its discretion by declining to appoint counsel.