IN THE SUPREME COURT OF THE STATE OF NEVADA

Case Nos. 53159 & 55759

NORMAN KEITH FLOWERS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

APPELLANT'S APPENDIX TO MOTION TO REINSTATE APPEALS VOLUME II OF III

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
*C.B. KIRSCHNER
Assistant Federal Public Defender
Nevada State Bar No. 14023C
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Fax: (702) 388-6419

*Counsel for Petitioner Norman Flowers

ALPHABETICAL INDEX

CHRONOLOGICAL INDEX

VOLUME I

VOLUME II

VOLUME III

Dated this 18th day of April, 2018.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ CB Kirschner
C.B. KIRSCHNER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

I served a true and accurate copy of the foregoing by placing it in the United States mail, first-class, postage pre-paid, addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, NV 89101

Adam Laxalt
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89104

I further certify that I have mailed the foregoing document by first-class mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following people:

Norman Flowers
#39975
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

/s/ Dayron Rodriguez
An Employee of the
Federal Public Defender, District of
Nevada

GPA
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUN 10 2011

BY, KATHERINE STREUBER, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS,
aka Norman Harold Flowers,
#1179383

Defendant.

216032

CASE NO: C228755
DEPT NO: VIII

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to: **COUNTS 1 & 2 – FIRST DEGREE MURDER (Category A Felony)**, as more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead guilty by way of the Alford decision is based upon the plea agreement in this case which is as follows:

Both parties stipulate to a sentence of life in prison without the possiblility of parole on Count 1. The parties stipulate to a sentence of life in prison with the possiblilty of parole on Count 2, Count 2 to run concurrent to Count 1. Defendant stipulates that the sentence in this case will run consecutive to C228755. Defendant agrees to withdraw his appeal in SC Case Nos. 53159 and 55759.

I agree to the forfeiture of any and all weapons or any interest in any weapons seized and/or impounded in connection with the instant case and/or any other case negotiated in whole or in part in conjunction with this plea agreement.

//

[redacted]
GPA
Guilty Plea Agreement
1466172

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I understand and agree that, if I fail to interview with the Department of Parole and Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate, by affidavit review, confirms probable cause against me for new criminal charges including reckless driving or DUI, but excluding minor traffic violations, that the State will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime(s) to which I am pleading guilty, including the use of any prior convictions I may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years, life without the possibility of parole, life with the possibility of parole after ten (10) years, or a definite twenty-five (25) year term with the possibility of parole after ten (10) years.

Otherwise I am entitled to receive the benefits of these negotiations as stated in this plea agreement.

CONSEQUENCES OF THE PLEA

By pleading guilty pursuant to the Alford decision, it is my desire to avoid the possibility of being convicted of more offenses or of a greater offense if I were to proceed to trial on the original charge(s) and of also receiving a greater penalty. I understand that my decision to plead guilty by way of the Alford decision does not require me to admit guilt, but is based upon my belief that the State would present sufficient evidence at trial that a jury would return a verdict of guilty of a greater offense or of more offenses than that to which I am pleading guilty.

I understand that as a consequence of my plea of guilty by way of the Alford decision the Court must sentence me, on each count, to a term of LIFE without the possibility of parole or LIFE with the possiblity of parole, with parole eligibility beginning after twenty (20) years has been served. I understand that the law requires me to pay an Administrative Assessment Fee.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I understand that I am not eligible for probation for the offense to which I am pleading guilty.

I also understand that I must submit to blood and/or saliva tests under the Direction of the Division of Parole and Probation to determine genetic markers and/or secretor status.

I further understand that if I am pleading guilty to charges of Burglary, Invasion of the Home, Possession of a Controlled Substance with Intent to Sell, Sale of a Controlled Substance, or Gaming Crimes, for which I have prior felony conviction(s), I will not be eligible for probation and may receive a higher sentencing range.

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I also understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that if the State of Nevada has agreed to recommend or stipulate a particular sentence or has agreed not to present argument regarding the sentence, or agreed not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor when the offense could have been treated as a felony, such agreement is contingent upon my appearance in court on the initial sentencing date (and any subsequent dates if the sentencing is continued). I understand that if I fail to appear for the scheduled sentencing date or I commit a new criminal offense prior to sentencing the State of Nevada would regain the full right to argue for any lawful sentence.

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I understand if the offense(s) to which I am pleading guilty to was committed while I was incarcerated on another charge or while I was on probation or parole that I am not eligible for credit for time served toward the instant offense(s).

I understand that if I am not a United States citizen, any criminal conviction will likely result in serious negative immigration consequences including but not limited to:

1. The removal from the United States through deportation;
2. An inability to reenter the United States;
3. The inability to gain United States citizenship or legal residency;
4. An inability to renew and/or retain any legal residency status; and/or
5. An indeterminate term of confinement, with the United States Federal Government based on my conviction and immigration status.

Regardless of what I have been told by any attorney, no one can promise me that this conviction will not result in negative immigration consequences and/or impact my ability to become a United States citizen and/or a legal resident.

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, then the District Attorney may also comment on this report.

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.
2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond

a reasonable doubt each element of the offense(s) charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

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My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 10 day of June, 2011.

NORMAN KEITH FLOWERS,
AKA NORMAN HAROLD FLOWERS
Defendant

AGREED TO BY:

PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF COUNSEL:

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which Alford pleas are being entered.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most likely result in serious negative immigration consequences including but not limited to:

   a. The removal from the United States through deportation;

   b. An inability to reenter the United States;

   c. The inability to gain United States citizenship or legal residency;

   d. An inability to renew and/or retain any legal residency status; and/or

   e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

   Morcover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of Alford offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

5. To the best of my knowledge and belief, the Defendant:

   a. Is competent and understands the charges and the consequences of pleading Alford as provided in this agreement,

   b. Executed this agreement and will enter all Alford pleas pursuant hereto voluntarily, and

   c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

Dated: This 10 day of June, 2011.

ATTORNEY FOR DEFENDANT

hjc/SVU

AIND
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS, aka,
Norman Harold Flowers, III,
#1179383

Defendant.

Case No. C216032
Dept. No. VIII

AMENDED

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant above named, **NORMAN KEITH FLOWERS, aka, Norman Harold Flowers, III**, accused by the Clark County Grand Jury of the crimes of **FIRST DEGREE MURDER (Category A Felony - NRS 200.010, 200.030)**; committed at and within the County of Clark, State of Nevada, on or about the 3rd day of May, 2005, as follows:

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COUNT 1 – FIRST DEGREE MURDER

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill victim, a human being, MARILEE COOTE, by manual strangulation with his hands and/or an unknown object; Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by killing MARILEE COOTE with premeditation, deliberation and malice aforethought; and/or (2) by killing MARILEE COOTE during the perpetration or attempted perpetration of sexual assault and/or burglary.

COUNT 2 – FIRST DEGREE MURDER

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill RENA GONZALES, a human being, by manual strangulation, Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by killing RENA GONZALES with premeditation, deliberation and malice aforethought; and/or (2) by killing RENA GONZALES during the perpetration or attempted perpetration of sexual assault and/or burglary.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY 
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

05BGJ016X/05F10466X/hjc/SVU
LVMPD EV# 0505030926/0505032974
(TRK11)

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

NORMAN KEITH FLOWERS,

Defendant.

CASE NO. C216032

DEPT. VIII

05C216032
TRANS
Transcript of Proceedings
1480176

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE

FRIDAY, JUNE 10, 2011

TRANSCRIPT OF PROCEEDINGS
CALENDAR CALL

APPEARANCES:

For the State: ELISSA LUZAICH, ESQ.
PAM WECKERLY, ESQ.
Chief Deputy District Attorneys

For the Defendant: DAVID M. SCHIECK, ESQ.
Special Public Defender

CLARK W. PATRICK, ESQ.
Deputy Special Public Defender

RECORDED BY: JILL JACOBY, COURT RECORDER

RECEIVED
JUN 20 2011
CLERK OF THE COURT

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FRIDAY, JUNE 10, 2011 AT 8:39 A.M.

MR. PATRICK: Your Honor.

THE COURT: Yeah.

MR. PATRICK: May we approach?

THE COURT: Yeah.

[Bench Conference Begins]

MR. PATRICK: Good morning. I think we have this negotiated.

THE COURT: Okay.

MR. PATRICK: There's one small sticking point. Mr. Flowers would like to speak to his mom for about five minutes to make sure he's doing the right thing.

MS. LUZAICH: She's right there.

THE COURT: I don't care.

MS. WECKERLY: Yeah, we don't care either.

MS. LUZAICH: No.

MR. PATRICK: Let me --

THE COURT: Where's the officer?

We can all leave here.

MR. PATRICK: Yeah.

MS. LUZAICH: Yeah, we're going upstairs to get paperwork anyway. So.

THE COURT: Okay.

[Bench Conference Concludes]

THE COURT: Mr. Flowers wants to talk to his mother. This is his mother.

THE CORRECTIONS OFFICER: Uh-huh.

THE COURT: You can't touch him. Do you understand that, ma'am? You

can't hug him, can't -- in fact, if you want to sit Mr. Flowers here, she can -- we're going to move everybody out of the courtroom so that they -- you obviously will stay.

THE CORRECTIONS OFFICER: Uh-huh.

THE COURT: I don't get involved in that. But if there's anything you feel uncomfortable about, you pull him out. Okay?

THE CORRECTIONS OFFICER: Okay.

THE COURT: Don't touch him, hug him. You talk to her.

MR. SCHIECK: You understand you'll be in the front row and he'll be on the other side there in the front. They'll sit in the front.

THE COURT: It'll just be you and him and this officer. I can't do anything about that. But I'll pull my staff out.

[Matter trailed at 8:40 a.m.]

[Matter recalled at 9:46 a.m.]

THE COURT: C216032, Norman Flowers. Is this resolved?

MR. PATRICK: No, Your Honor.

THE COURT: Okay. Then we'll go to trial. You understand you're looking at the death penalty.

THE DEFENDANT: Yes.

THE COURT: Twice. And once we walk out the door, there's no negotiation, we're going to trial.

THE DEFENDANT: I want it resolved, but they want me to waive my right --

THE COURT: There won't –

THE DEFENDANT: -- my appeal on –

THE COURT: There won't be another negotiation. Do you understand? No chance.

THE DEFENDANT: They want me to waive --

THE COURT: None.

THE DEFENDANT: They want me to waive my right, Your Honor, on another case.

THE COURT: You know what? That's up to you.

MR. PATRICK: Norman, there's no chance you're going to get any action on the direct appeal. Okay?

THE COURT: There is no chance that you're going to get a better offer than today.

THE DEFENDANT: If I'm not going to get no action on direct appeal, why do I have to waive that right, then? It shouldn't matter.

THE COURT: Okay.

MR. PATRICK: Okay.

THE COURT: That's your privilege to -- I'm not -- I don't have a dog in the fight, I don't care one way or the other, I'm here for the next three weeks anyway. I've got it set trial. But understand, you have to take the decision that you've made. Do you understand? No deals once I leave this room. That's okay.

Monday morning at 9:30.

MS. WECKERLY: Your Honor --

MR. PATRICK: Your Honor, a couple of things, please. We need Mr. Flowers remanded today to CCDC.

THE COURT: All right.

MR. PATRICK: Also, do we have a schedule as -- are we going to be dark next Thursday or how is that going to work?

THE COURT: We're going to try and find a courtroom.

MR. PATRICK: Okay.

THE COURT: For the morning.

MR. PATRICK: Very good.

THE COURT: The afternoon we'll probably be able to try it from 1 o'clock on here.

MR. PATRICK: Okay. So 9:30 Monday?

THE COURT: Monday at 9:30.

MR. PATRICK: The last thing and I talked to the State about this. I have a DNA expert, his only available day would be Monday the 20th to testify. So even if we might have to call him out of order --

MS. WECKERLY: That's fine.

THE COURT: I don't care.

MS. WECKERLY: That's fine. So 9:30, Monday.

MS. LUZAICH: Can we just get a tentative schedule for your hours?

THE COURT: We start at 9:30. Tuesday, I vacated all of my civil except two cases so we should be ready by 9 o'clock on Tuesday.

MS. WECKERLY: Okay. Thank you.

THE COURT: Wednesday, 9:30. And we stop at 4:30, of course. Thursday, probably 1 o'clock, unless I can find a courtroom. And Friday, we could actually start at 8 o'clock, but that would difficult for --

MS. LUZAICH: No, no, no, no, no.

MR. PATRICK: That's fine, Your Honor.

THE COURT: Lisa –

MS. WECKERLY: No.

THE COURT: Lisa can't even get up that early.

MS. LUZAICH: I've got kids, I'm up, I'm just not here.

THE COURT: I've got kids, I'm up too. So.

MS. LUZAICH: Can we just start at 9 on Friday?

THE COURT: Yeah. Friday, we'll start at 9.

MS. LUZAICH: Thank you. And if the Court remembers, the second week, my daughter -- you were going to give me Wednesday morning off, the 22nd.

THE COURT: Yeah.

MS. LUZAICH: Thank you.

THE COURT: Or you -- maybe you don't have to be here.

MS. LUZAICH: No, no, no.

MR. SCHIECK: Judge, can you sit for one second? Just -- please. Thank you very much, Your Honor.

[Pause in proceeding]

MS. LUZAICH: Judge, do you bring in 65 in Monday and 65 Tuesday?

THE COURT: [Nods head yes.]

MS. LUZAICH: Oh. Oh, okay.

MR. PATRICK: Oh, do we want to put together a -- I've got a list of ours that we would excuse for cause without even bringing them in.

Oh, okay. Never mind.

MS. LUZAICH: But there were two jurors that you had copies of one --

MR. PATRICK: Right. Right.

MS. LUZAICH: -- had travel plans and the other something.

THE CLERK: I have copies right here. I have one for -- one for each side.

MS. LUZAICH: Thank you.

[Colloquy among counsel]

MS. LUZAICH: I had two jurors that were going, like, planning on being out of town on Monday. Like, are they already excused? One was leaving town on the 12th. No?

THE COURT: I haven't excused anybody.

MS. LUZAICH: Okay. I just -- I had one that was leaving town on the 12th.

THE COURT: I gave you the two documents that I got. That's all I've done. I haven't --

MS. WECKERLY: Okay. We -- if we have a list of agreed-upon people --

THE COURT: Yeah.

MS. WECKERLY: -- and we get it to the Court this afternoon.

THE COURT: Yep.

[Colloquy among Counsel]

MR. PATRICK: Judge, I'm sorry, this case has been negotiated.

MS. LUZAICH: Oh, okay.

THE COURT: Okay. What's the negotiation?

MR. PATRICK: Could we have five minutes to go over --

THE COURT: Yep.

MR. PATRICK: -- the Guilty Plea Agreement with Mr. Flowers, please.

THE COURT: Yep. I'll just sit right here. You tell me when you're ready. Or do you want me to leave?

MS. LUZAICH: I'm going to give Kathy the Amended Indictment --

THE COURT: If you want me to leave, I'll leave.

MS. LUZAICH: -- just so that she has it.

THE CLERK: I won't file it yet.

[Pause in proceedings]

MR. PATRICK: Your Honor, may I approach and have these filed in open court?

THE COURT: Yes.

THE CLERK: Amended Indictment.

MR. PATRICK: Oh, for me?

THE CLERK: One for you and one for the State.

THE COURT: This is C216032, State of Nevada versus Norman Flowers. Is this resolved?

MR. PATRICK: It is, Your Honor.

THE COURT: Negotiations.

MR. PATRICK: Your Honor, today Mr. Flowers is going to plead guilty pursuant to *North Carolina v Alford* on Counts 1 and 2 of the Amended Indictment charging first-degree murder. The parties have stipulated to sentence on Count 1 of life in prison without the possibility of parole. On Count 2, the parties have stipulated to a sentence of life in prison with the possibility of parole. Count 2 to run concurrent to Count 1. And Count 1 to run consecutive to C228755.

MS. WECKERLY: That's correct, Your Honor. It'll be the sentence in this case that'll run consecutive to C228755. And the Defendant --

MR. PATRICK: Oh, I'm sorry.

MS. WECKERLY: Go ahead.

MR. PATRICK: Okay. And the Defendant is withdrawing his appeal under Supreme Court Case Numbers 53159 and 55759.

THE COURT: Is that your understanding of the negotiations, sir?

THE DEFENDANT: Yes.

THE COURT: Do you accept those negotiations after discussing the matter

fully with your three attorneys?

THE DEFENDANT: Yes.

THE COURT: You read, write, and understand English?

THE DEFENDANT: Yes.

THE COURT: You've had a chance to read through your Guilty Plea Agreement and your Amended Indictment, discuss that fully with your attorney and you understand them?

THE DEFENDANT: Yes.

THE COURT: The Amended Indictment indicates on or about May 3rd, 2005, that you committed Count 1, first-degree murder where you did then and there willfully, feloniously, without authority of law with premeditation, deliberation, or with malice aforethought to kill a victim, a human being, Marilee Coote, by manual strangulation with hands and/or an unknown object. Defendant being responsible on one or more of the following principles or criminal liability: (1) by killing Marilee Coote with premeditation, deliberation, and malice aforethought; and/or (2) by killing Marilee Coote during the perpetration or attempted perpetration of a sexual assault or burglary.

And Count 2, first-degree murder, did then and there willfully, feloniously, without authority of law and with premeditation and deliberation with malice aforethought kill Rena Gonzales, a human being, by manual strangulation. Defendant being responsible under one or more of the following principles of criminal liability to wit: (1) by killing Rena Gonzales with premeditation, deliberation, and malice aforethought; and/or Number 2, by killing Rena Gonzales during the perpetration or attempted perpetration of sexual assault and/or burglary.

You've read that and discussed that fully with your attorney. And do

you have any questions for the Court about your Amended Indictment?

THE DEFENDANT: No.

THE COURT: Now, it's my understanding that you wish to plead guilty pursuant to the *Alford* plea; is that correct?

THE DEFENDANT: Correct.

THE COURT: That means you're not admitting guilt, but you have heard the evidence as the State's going to present it and you believe that they will meet their burden of proof and to avoid a harsher sentence on one or more counts, you've agreed to enter this plea; is that correct?

THE DEFENDANT: Yes.

THE COURT: What would the State prove?

MS. WECKERLY: Your Honor, on May the 3rd at 2005 at the Silver Pines Apartments some --

THE COURT: Listen to what she says because I'm going to ask if that's what they prove, not that you're pleading guilty to it, but you think that's what she would prove.

MS. WECKERLY: Silver Pines Apartment employees discovered the body of Marilee Coote lying in her living room. She was lying face up and she was completely nude. Inside of her belly button were ashes from burned incense. The skin between her upper thighs and pubic area was burned. Her apartment was locked, but her purse and keys were missing. Inside of her washing machine and inside of her bathtub, police found personal photos, bills, and identification belonging to Ms. Coote. The items appeared to have gone through a wash cycle.

At autopsy, the doctor concluded that she died as a result of strangulation. He also noted tearing in the area of her labia and anal area

consistent with the sexual assault that was antemortem. Ms. Coote also had contusions on her forearms and upper arms.

Another lady who was at the apartment complex that day is named Juanita Curry. Between 7 and 10 a.m., Mr. Flowers was seen by Ms. Curry and had several conversations with her. Ms. Curry had a conversation with Mr. Flowers about police and paramedics going in and out of Coote's apartment, and Curry described Mr. Flowers as turning away and avoiding looking at the police when they come -- when they came down the stairs. In his interactions with Juanita Curry, he repeatedly asked to use her phone, he came back and asked for water, he asked to use her bathroom. She agreed with all these requests, but she always stepped out of her apartment when he stepped inside of it. During their final encounter, he commented that the police made her – made him nervous. And he also tried to kiss her when he separated from her.

Ms. Curry observed Mr. Flowers in the area of the doorway to another lady's apartment at the complex that morning and that's a woman by the name of Rena Gonzales. At 4 o'clock that afternoon, Rena Gonzales's two school-aged daughters returned home and found their mother on her knees leaning across her bed in the master bedroom. Her apartment was completely clean but there was a broken plastic hairpiece in the doorway and one of her shoes indicating there was an area struggle near the doorway.

A black phone cord and black lanyard were around the neck of Rena Gonzalez. She was dressed in shorts which were slightly pulled down and then the pair or the matching hairclip from the one in the doorway was found on her head.

At autopsy, Dr. Simms noted extensive bruising to her right breast, her right arm, her right leg. He concluded that she died as a result of strangulation. He

also noted tearing to her vaginal and anal area.

It was a woman who lived in the apartment complex by the name of Mawusi Ragland who Mr. Flowers had socialized with in the past. He called her on the evening that the two homicides were discovered and Ms. Ragland brought up the fact that the two women had been killed and that she was acquainted with them and Mr. Flowers commented as to Rena Gonzales: I didn't kill her.

Mr. Flowers' DNA was found in the vaginal swabs taken from Marilee Coote at autopsy. His DNA was also found in the piece of carpet under which -- or, well, that Marilee Coote was lying upon. And his DNA was specifically found in the area where her legs and pubic area would have been.

The State also had evidence that three months earlier, and this was admitted as a result of a bad acts motion, Mr. Quarles -- or Mr. Flowers' DNA was found in the vaginal area of a young woman 18 years old by the name of Sheila Quarles. Ms. Quarles actually had two DNA samples found in her when she was killed and she also had indications of sexual assault. The one DNA source was an individual by the name of George Brass, but he had an alibi and had checked into work by the time of the murder. The other individual whose DNA was identified was Mr. Flowers. And the police later learned through investigation that Mr. Flowers was acquainted with Sheila Quarles because he had dated her mother.

As a result of these facts as to the instant case, the State would be able to establish as to Marilee Coote, charges of murder, sexual assault, burglary, and robbery. As to Rena Gonzales, the charges, because of the lanyard, would be murder with a deadly weapon, sexual assault, burglary, and robbery.

THE COURT: This happened in Clark County, Nevada.

MS. WECKERLY: That's correct.

THE COURT: Is that your understanding what the State probably would prove at trial?

THE DEFENDANT: I can't really say.

THE COURT: Do you have any quarrel with them proving that at trial? You've talked to your attorneys.

THE DEFENDANT: All I know, Your Honor, is I want to do this, but --

THE COURT: Ask -- talk --

[Colloquy between Counsel and Defendant]

THE DEFENDANT: One of their cases alone forensic evidence says I wasn't even in --

THE COURT: All right.

THE DEFENDANT: -- the resident.

THE COURT: All right. I understand. You've talked to your attorneys. The State had to give an offer of proof what they would prove at trial. And you're going to plead guilty not because you are guilty because they would prove that at trial and you're trying to avoid a harsher penalty; is that right?

[Colloquy between Counsel and Defendant]

MR. SCHIECK: I think the question is: Do you understand that that's the evidence that the State would intend to present at trial?

THE DEFENDANT: Yes.

THE COURT: Okay. Both parties stipulate to a sentence of life in prison without the possibility of parole on Count 1. Parties stipulate to a sentence of life in prison with the possibility of parole in Count 2. Count 2 to run concurrent to Count 1. Defendant stipulates that the sentence will in this case will run consecutive to C228755. Defendant agrees to withdraw his appeal in Supreme Court

Case 53159 and 55759.

Is that your stipulation?

MR. PATRICK: Yes, Your Honor.

THE DEFENDANT: Yes.

THE COURT: Do you agree to forfeit any and all weapons that of -- or interest in any weapons seized in conjunction with the instant case or cases that will be dismissed?

I don't think any weapons were taken, were there?

MS. LUZAICH: That's correct.

THE COURT: Okay. We can probably do this from a PSI from that other case in a week.

MS. WECKERLY: Yeah, I think that would work.

THE COURT: You understand we could do this from a PSI from that other case that we wouldn't have to go to another interview with Department of Parole and Probation.

MR. PATRICK: Your Honor --

THE COURT: Do you want a new PSI?

MR. PATRICK: We don't necessarily want a new PSI, but --

MR. SCHIECK: Maybe an amended one. So.

MR. PATRICK: Maybe an amended one, so could we have 30 days?

THE COURT: Yes. By pleading guilty pursuant to the *Alford* decision, it is your desire to avoid the possibility of being convicted of more offenses or of a greater offense if you were to proceed to trial on the original charges and of also receiving a greater penalty. You understand that your decision to plead guilty by way of the *Alford* decision does not require you to admit guilt, but is based upon

your belief that the State would present sufficient evidence at trial that a jury would return a verdict of greater -- of a greater offense or of more offenses in that to which you are pleading guilty; is that correct?

THE DEFENDANT: Yes.

THE COURT: You understand that as a consequence of your plea of guilty by way of the *Alford* decision, the Court must sentence you on each count to a term of life without the possibility of parole or life with the possibility of parole with parole eligibility beginning 20 years -- after 20 years has been served. And you understand the law requires you to pay an administrative assessment fee.

THE DEFENDANT: Yes.

THE COURT: You understand, if appropriate, the Court will order you to make restitution for the victims of the offenses?

THE DEFENDANT: Yes.

THE COURT: You understand you're not eligible for probation for the offense to which you are pleading guilty?

THE DEFENDANT: Yes.

THE COURT: You also understand if you haven't -- you probably have submitted to a blood or saliva test under the direction of P&P to determine the genetic markers or secretor status and pay for that.

THE DEFENDANT: Yes.

THE COURT: Probably already done that.

MR. PATRICK: It has been, Your Honor.

THE COURT: You further understand that if more -- well, I'm going to follow the recommendation. But if more than one sentence is imposed, it's up to the Judge. I'm telling you by this negotiation, I'm going to follow the recommendation of

the parties.

You understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the Judge at sentencing.

THE DEFENDANT: Yes.

THE COURT: You've not been promised or guaranteed any particular sentence by anyone other than what's been mentioned here in court?

THE DEFENDANT: Yes.

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: Yes.

THE COURT: We're going to order a P&P report update of the PSI from C228755 and ask them to do that within a 30-day period.

By entering your -- and that may include hearsay information that I can rely on. You understand that?

THE DEFENDANT: Yes.

THE COURT: The PSI. By entering a plea of guilty, you understand or waiving and forever giving up the following privileges: Number 1, the constitutional privilege against self-incrimination, including the right to refuse to testify at trial in which event prosecution would not be allowed to comment to the jury about your refusal to testify.

MR. PATRICK: Excuse me, Your Honor.

THE COURT: Sure.

[Colloquy between Counsel and the Defendant]

THE DEFENDANT: Yes.

THE COURT: Number 2, the constitutional right to a speedy and a public trial

by an impartial jury free of excessive pretrial publicity prejudicial to the defense at which trial you would be entitled to the assistance of an attorney either appointed or retained. At trial, the State would bear the burden of proof beyond a reasonable doubt each element of the offenses charged. You understand that?

THE DEFENDANT: Yes.

THE COURT: You're giving up the constitutional right to confront and cross-examine any witnesses who would testify against you, constitutional right to subpoena witnesses to testify on your behalf. And the right -- excuse me -- to testify in your own defense. You understand?

THE DEFENDANT: Yes.

THE COURT: You're also giving up the right to appeal your conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and upon agreed as provided by NRS 174.035.

You understand this means that you are unconditionally waiving your right to a direct appeal of this conviction, including any challenge based upon reasonable, constitutional, jurisdictional, or other grounds that challenge the legality of these proceedings as stated in NRS 177.051. However, you will remain free to challenge any conviction through post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34. You understand that?

THE DEFENDANT: Yes.

THE COURT: You've discussed the elements of the original charges against you with your attorneys, and you understand the nature of the charges today?

THE DEFENDANT: Yes.

THE COURT: You understand the State would have to prove each element of the charge against you at trial beyond a reasonable doubt to convict you?

THE DEFENDANT: Yes.

THE COURT: You've discussed with your attorney any possible defenses, defense strategies, and circumstances which might be in your favor?

THE DEFENDANT: Y es.

THE COURT: All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to you by your attorney?

THE DEFENDANT: Yes.

THE COURT: You believe that pleading guilty through the *Alford* decision and accepting this plea bargain is in your best interest and that a trial would be contrary to your best interest?

THE DEFENDANT: Yes.

THE COURT: You signed this Guilty Plea Agreement voluntarily after consultation with your attorney and you weren't acting under duress or coercion by virtue of any promises of leniency except for those set forth in this agreement?

THE DEFENDANT: Yes.

THE COURT: You are not under the influence of anything now that would impair your ability to comprehend or understand this agreement for the proceeding surrounding your entry of plea?

THE DEFENDANT: No.

THE COURT: Your attorneys have answered all your questions regarding this Guilty Plea Agreement and its consequences to your satisfaction and you're satisfied with their services?

THE DEFENDANT: Can you say that again, please?

THE COURT: Your attorney has answered all of your questions regarding this Guilty Plea Agreement that I'm showing you that you signed to your satisfaction

and its consequences to your satisfaction and your satisfied with the services provided by all three of your attorneys?

THE DEFENDANT: Yes.

THE COURT: Okay. I'll accept the plea. We'll set it down for sentence. We'll ask the Department of Parole and Probation to do an updated PSI.

Thank you, Mr. Flowers. Thank you, Counsel.

MR. SCHIECK: Your Honor, I believe we'll also be contacting the department to point out some areas --

THE COURT: Okay.

MR. SCHIECK: -- that we think need to be corrected. So that --

THE COURT: Under that new case that's come down.

MR. SCHIECK: -- we'll copy --

THE COURT: All right.

MR. SCHIECK: We'll copy the DA on that.

THE COURT: Right.

MR. SCHIECK: Right. Because we can't correct it later.

THE COURT: Right.

MR. SCHIECK: And also we need to rescind the order of remand, he can go ahead and go back up to the --

THE COURT: And go back to the prison. Okay. Thank you.

THE CLERK: That's July 13th, 8 a.m.

MR. PATRICK: You know, I'm going to be out of the jurisdiction. Can we do it, like, two weeks past that?

THE CLERK: Two weeks past?

MR. PATRICK: Please. Or no, just one week.

THE CLERK: One week?

MR. PATRICK: Yeah.

THE DEFENDANT: Two weeks is fine.

THE CLERK: July 20th.

MR. PATRICK: July 20th? That's fine.

THE CLERK: A Wednesday.

THE COURT: Thank you.

MR. PATRICK: Very good.

[Proceeding concluded at 10:22 a.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case.

Jill Jacoby
Court Recorder

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

NORMAN KEITH FLOWERS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent

CASE NO. 53159
CASE NO. 55759

MOTION TO VOLUNTARILY DISMISS APPEALS

Appellant Norman Flowers, by and through his counsel David M. Schieck, Special Public Defender and JoNell Thomas, Deputy Special Public Defender, and moves this Court to dismiss his appeals docketed in this Court under Case No. 55759 and 53159 (consolidated by Order of this Court) pursuant to a Guilty Plea Agreement filed in District Court Case No. C216032.

Appellant requests that this Court dismiss this appeal on or after July 20, 2011, which is the date set for the sentencing hearing and imposition of judgment in the related district court case (Case No. C216032); and requests that this Court stay all proceedings in these two appeals (Case No. 55759 and 53159) until that date.

This request is based on the Declaration of Counsel attached hereto and the filed copy of the Guilty Plea Agreement attached hereto as Exhibit A.

Dated this 13th day of June, 2011.

RESPECTFULLY SUBMITTED:

DAVID M. SCHIECK
Special Public Defender
JONELL THOMAS
Deputy Special Public Defender
Nevada Bar No. 4771
330 S. Third St., No. 800
Las Vegas NV 89101
702-455-6270

DECLARATION OF CLARK W. PATRICK

CLARK W. PATRICK makes the following declaration:

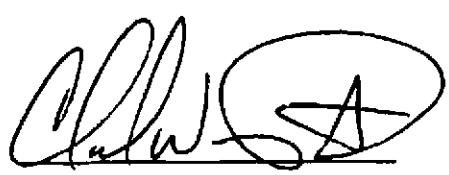
I am an attorney duly licensed to practice law in the State of Nevada. I am one of the Deputy Special Public Defender's assigned to handle Mr. Flowers' capital trial which was set to commence June 13, 2011 (Eighth Judicial District Case No. C216032). Randall H. Pike, the other Deputy assigned, was out of town on the day of the calendar call, June 10, 2011, and therefore I appeared along with Mr. Schieck.

In addition, Mr. Schieck accompanied me when I went to meet with Mr. Flowers at High Desert State Prison on June 9, 2011, to discuss his negotiations and the consequences of waiving his appeals should he plead guilty and the consequences of dismissing the consolidated appeals in the instant matter. JoNell Thomas, appellate attorney for Mr. Flowers, wrote him a letter setting forth the issues involved with dismissing the appeal and we brought same with us to the prison and discussed its contents with Mr. Flowers at some length.

Having discussed this matter with Mr. Flowers, I believe that he fully understands the consequences of dismissing these appeals and believe that doing so is in his best interest.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 13th day of June, 2011.



CLARK W. PATRICK

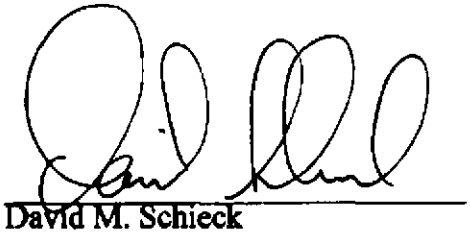
CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 13th day of June, 2011 a copy of the foregoing Motion to Voluntarily Dismiss Appeals was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701



David M. Schieck

EXHIBIT A

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUN 10 2011

BY, KATHERINE STREUBER, DEPUTY

GPA
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS,
aka Norman Harold Flowers,
#1179383

Defendant.

CASE NO: ~~C228755~~ 216032
DEPT NO: VIII

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to: **COUNTS 1 & 2 – FIRST DEGREE MURDER (Category A Felony)**, as more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead guilty by way of the Alford decision is based upon the plea agreement in this case which is as follows:

Both parties stipulate to a sentence of life in prison without the possiblility of parole on Count 1. The parties stipulate to a sentence of life in prison with the possiblilty of parole on Count 2, Count 2 to run concurrent to Count 1. Defendant stipulates that the sentence in this case will run consecutive to C228755. Defendant agrees to withdraw his appeal in SC Case Nos. 53159 and 55759.

I agree to the forfeiture of any and all weapons or any interest in any weapons seized and/or impounded in connection with the instant case and/or any other case negotiated in whole or in part in conjunction with this plea agreement.

//

I understand and agree that, if I fail to interview with the Department of Parole and Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate, by affidavit review, confirms probable cause against me for new criminal charges including reckless driving or DUI, but excluding minor traffic violations, that the State will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime(s) to which I am pleading guilty, including the use of any prior convictions I may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years, life without the possibility of parole, life with the possibility of parole after ten (10) years, or a definite twenty-five (25) year term with the possibility of parole after ten (10) years.

Otherwise I am entitled to receive the benefits of these negotiations as stated in this plea agreement.

CONSEQUENCES OF THE PLEA

By pleading guilty pursuant to the Alford decision, it is my desire to avoid the possibility of being convicted of more offenses or of a greater offense if I were to proceed to trial on the original charge(s) and of also receiving a greater penalty. I understand that my decision to plead guilty by way of the Alford decision does not require me to admit guilt, but is based upon my belief that the State would present sufficient evidence at trial that a jury would return a verdict of guilty of a greater offense or of more offenses than that to which I am pleading guilty.

I understand that as a consequence of my plea of guilty by way of the Alford decision the Court must sentence me, on each count, to a term of LIFE without the possibility of parole or LIFE with the possiblity of parole, with parole eligibility beginning after twenty (20) years has been served. I understand that the law requires me to pay an Administrative Assessment Fee.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I understand that I am not eligible for probation for the offense to which I am pleading guilty.

I also understand that I must submit to blood and/or saliva tests under the Direction of the Division of Parole and Probation to determine genetic markers and/or secretor status.

I further understand that if I am pleading guilty to charges of Burglary, Invasion of the Home, Possession of a Controlled Substance with Intent to Sell, Sale of a Controlled Substance, or Gaming Crimes, for which I have prior felony conviction(s), I will not be eligible for probation and may receive a higher sentencing range.

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I also understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that if the State of Nevada has agreed to recommend or stipulate a particular sentence or has agreed not to present argument regarding the sentence, or agreed not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor when the offense could have been treated as a felony, such agreement is contingent upon my appearance in court on the initial sentencing date (and any subsequent dates if the sentencing is continued). I understand that if I fail to appear for the scheduled sentencing date or I commit a new criminal offense prior to sentencing the State of Nevada would regain the full right to argue for any lawful sentence.

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I understand if the offense(s) to which I am pleading guilty to was committed while I was incarcerated on another charge or while I was on probation or parole that I am not eligible for credit for time served toward the instant offense(s).

I understand that if I am not a United States citizen, any criminal conviction will likely result in serious negative immigration consequences including but not limited to:

1. The removal from the United States through deportation;
2. An inability to reenter the United States;
3. The inability to gain United States citizenship or legal residency;
4. An inability to renew and/or retain any legal residency status; and/or
5. An indeterminate term of confinement, with the United States Federal Government based on my conviction and immigration status.

Regardless of what I have been told by any attorney, no one can promise me that this conviction will not result in negative immigration consequences and/or impact my ability to become a United States citizen and/or a legal resident.

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, then the District Attorney may also comment on this report.

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.
2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond

a reasonable doubt each element of the offense(s) charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

//

//

My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 10 day of June, 2011.

NORMAN KEITH FLOWERS,
AKA NORMAN HAROLD FLOWERS
Defendant

AGREED TO BY:

PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF COUNSEL:

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which Alford pleas are being entered.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most likely result in serious negative immigration consequences including but not limited to:

   a. The removal from the United States through deportation;

   b. An inability to reenter the United States;

   c. The inability to gain United States citizenship or legal residency;

   d. An inability to renew and/or retain any legal residency status; and/or

   e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

   Moreover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of Alford offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

5. To the best of my knowledge and belief, the Defendant:

   a. Is competent and understands the charges and the consequences of pleading Alford as provided in this agreement,

   b. Executed this agreement and will enter all Alford pleas pursuant hereto voluntarily, and

   c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

Dated: This 10 day of June, 2011.

ATTORNEY FOR DEFENDANT

hjc/SVU

AIND
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS, aka, Norman Harold Flowers, III, #1179383

Defendant.

Case No. C216032
Dept. No. VIII

AMENDED

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant above named, **NORMAN KEITH FLOWERS, aka, Norman Harold Flowers, III**, accused by the Clark County Grand Jury of the crimes of **FIRST DEGREE MURDER (Category A Felony - NRS 200.010, 200.030)**; committed at and within the County of Clark, State of Nevada, on or about the 3rd day of May, 2005, as follows:

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COUNT 1 – FIRST DEGREE MURDER

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill victim, a human being, MARILEE COOTE, by manual strangulation with his hands and/or an unknown object; Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by killing MARILEE COOTE with premeditation, deliberation and malice aforethought; and/or (2) by killing MARILEE COOTE during the perpetration or attempted perpetration of sexual assault and/or burglary.

COUNT 2 – FIRST DEGREE MURDER

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill RENA GONZALES, a human being, by manual strangulation, Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by killing RENA GONZALES with premeditation, deliberation and malice aforethought; and/or (2) by killing RENA GONZALES during the perpetration or attempted perpetration of sexual assault and/or burglary.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY 
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

05BGJ016X/05F10466X/hjc/SVU
LVMPD EV# 0505030926/0505032974
(TRK11)

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS A/K/A NORMAN HAROLD FLOWERS, III, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 53159
NORMAN HAROLD FLOWERS, III, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 55759

FILED

JUN 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Woolsey
DEPUTY CLERK

ORDER

Appellant has filed a motion to voluntarily dismiss these appeals. He indicates that he has entered a plea agreement in another district court case (no. C216032) with one of the terms of the agreement being that he withdraws these appeals. To comply with that agreement, he asks this court to stay resolution of these appeals pending sentencing pursuant to the plea agreement, which is scheduled for July 20, 2011. Upon sentencing in that case, he asks that we dismiss these appeals.

We will take no action on the motion or these appeals at this time. Appellant shall file a written report with the clerk of this court on or before July 21, 2011, regarding the status of the proceedings and sentencing in district court case no. C216032.

It is so ORDERED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Special Public Defender
Attorney General/Carson City
Clark County District Attorney

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS A/K/A NORMAN HAROLD FLOWERS, III, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 53159
NORMAN HAROLD FLOWERS, III, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 55759

FILED

SEP 28 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DISMISSING APPEALS

These are consolidated appeals from a judgment of conviction and an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge. Appellant has filed a motion to dismiss these appeals pursuant to a plea agreement in another case. Counsel represents that the consequences of dismissing these appeals have been explained to appellant and that appellant understands those consequences. Cause appearing, the motion is granted and we

ORDER these appeals DISMISSED.[1]

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

[1]Because no remittitur will issue in this matter, see NRAP 42(b), the one-year period for filing a post-conviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order.

cc: Hon. Linda Marie Bell, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk
Norman Keith Flowers

Electronically Filed
02/12/2016 02:57:49 PM

CLERK OF THE COURT

KAREN A. CONNOLLY
Nevada Bar No. 4240
KAREN A. CONNOLLY, LTD.
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Attorney for Petitioner

DISTRICT COURT, CRIMINAL DIVISION
CLARK COUNTY, NEVADA

NORMAN KEITH FLOWERS
ID #39975,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

CASE NO.: 05C216032
DEPT. NO.: VIII

SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

COMES NOW Petitioner Norman Flowers by and through his attorney of record, KAREN A. CONNOLLY, of the law firm of KAREN A. CONNOLLY, LTD., and submits this *Supplement to Petition for Writ of Habeas Corpus (Post Conviction)*.

DATED this 11th day of February 2016.

KAREN A. CONNOLLY, LTD.

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MEMORANDUM

PROCEDURAL HISTORY

On October 14, 2005, NORMAN KEITH FLOWERS, aka Norman Harold Flowers was charged by way of Indictment as follows: COUNT 1 -5 Burglary (Felony- NRS 205.060); COUNT 2- Murder (Felony- NRS 200.010, 200.030); COUNTS 3 & 4- Sexual Assault (Felony- NRS 200.364, 200.366); COUNT 5 -Robbery (Felony- NRS 200.380); COUNT 6- Burglary while in Possession of a Deadly Weapon (Felony- NRS 205.060, 193.165); COUNT 7 - Murder With Use of a Deadly Weapon (Felony- NRS 200.010,200.030, 193.165); COUNTS 8 & 9- Sexual Assault With Use of a Deadly Weapon (Felony -NRS 200.364, 200.366, 193.165); COUNTS 10 & 11- Unlawful Sexual Penetration of a Dead Human Body (Felony - NRS 201.450); and COUNT Robbery With Use of a Deadly Weapon (Felony- NRS7 200.380, 193.165). Appellant was arraigned and plead not guilty on October, 18, 2005. The State filed Notice of Intent to Seek the Death Penalty on November 8, 2005 and an Amended Notice of Intent to Seek Death15 Penalty on February 4, 2009. The victims in the instant case were Marillee Coote and Rena Gonzales.

Case 6C2289755

On December 26, 2006, the State sought to consolidate the instant matter with District Court Case Number 6C228755 in which Flowers was charged with the murder of Sheila Quarles. The motion was denied. Flowers proceeded to trial in that capital case and was convicted of first degree murder, sexual assault, burglary and not guilty of robbery. He was sentenced to life without the possibility of parole on the murder charge. He appealed that conviction. The appeal was dismissed as per negotiations in the instant matter. Flowers then pursued post conviction relief. A copy of the *Petition for Writ of Habeas Corpus (Post-Conviction), Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), Reply to State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)*, and *Findings of Fact, Conclusions of Law and Order* denying post conviction relief filed in that case on May 28, 2015, are attached hereto as Exhibit 1,2,3, 4, and 5 and are adopted and incorporated herein by reference. Since Flowers' request for post conviction relief in that case has been litigated,

undersigned counsel has not addressed any post conviction issues in that case herein but adopts the arguments made by Flowers in that matter.

Case C216032

As previously stated, in the instant matter Flowers negotiated both the instant case which involved the deaths of Marilee Coot and Rena Gonzales and the companion case involving the death of Sheila Quarles. On June 10, 2011, he entered a plea of by way of Alford to an Amended Indictment, charging him with two (2) counts of First Degree Murder (Felony- NRS 200.010, 200.030). The parties stipulated to a sentence of life without the possibility of parole on count 1, and life with the possibility of parole on count 2, to run concurrent to count 1. Defendant additionally agreed to withdraw his appeals in Supreme Court Case Numbers 53159 and 55759.

On August 18, 2011, Appellant was sentenced as follows - as to count 1 - life without the possibility of parole; and as to count 2 - twenty-five (25) to life, to run concurrent with count 1. The Court ordered Defendant's sentence to run consecutive to Case Number 06C228755.

Flowers filed a Notices of Appeal on September 15, 2011. On December 13, 2012, the Supreme Court of Nevada affirmed Defendant's conviction. Remittitur issued on January 9, 2013.

On June 28, 2011, Flowers moved to withdraw his plea. On July 13, 2011, conflict free counsel was appointed to represent him on his request to withdraw his plea. An evidentiary hearing was held on July 27, 2011. Flowers alleged that he was coerced into accepting the plea negotiations and that he did not realize that his plea agreement involved waiving his right to appeal in his other murder case. On August 23, 2011, the court entered an order denying the request A motion to reconsider was filed on August 23. 2011 which was subsequently denied on October 25, 2011. Flowers' appeal to the Nevada Supreme Court was denied on December 13, 2012.

ARGUMENT

AN EVIDENTIARY HEARING IS REQUIRED TO ADDRESS WHETHER OR NOT THE STATE COMPLIED WITH PLEA NEGOTIATIONS

As part of the plea negotiations, the State agreed to contact the Inspector General to request that Flowers be placed at Lovelock. See, pages 37-38 of EH Transcript, July 27, 2011, attached

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hereto as Exhibit 6. Flowers does not believe that the State complied in this regard thereby violating the terms of the plea negotiations.

During post conviction proceedings, undersigned attempted to ascertain whether or not the State had fulfilled its obligations to Flowers in this regard. Attached hereto as Exhibit 7 is an email from Chief Deputy District Attorney Lisa Luzaich dated June 15, 2015, wherein Ms.Luzaich addresses inquires she made in regards to Flowers' placement at Lovelock.

If the State did not make contact the Inspector General's Office to request that Flowers be placed at Lovlelock, it will be a material violation of the terms of plea negotiations. Flowers requests permission to conduct discovery in regard to this issue.

The United States Supreme Court has held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). Wen the state enters a plea agreement, it is held to the most meticulous standards of both promise and performance. Citti v. State, 107 Nev. 89, 91, 807 P.2d 724, 726 (1991), Statz v. State, 113 Nev. 987, 944 P.2d 813 (1997). Violation of either the terms or the spirit of the agreement requires reversal. Id.

The Nevada Supreme Court has held that a post-conviction habeas petitioner "'is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief.'" McConnell, 125 Nev. Adv. Rep. 24, 212 P.3d at 314 (quoting Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002)) In the instant matter, Flowers submits that the state did not follow through with its promise in regard to his placement at Lovelock Therefore, the court should hold an evidentiary hearing to determine the extent of the State's efforts to comply with plea negotiations.

SINCE THE DISTRICT COURT IMPROPERLY INTERJECTED ITSELF INTO PLEA NEGOTIATIONS IN VIOLATION OF STATE AND FEDERAL LAW, THE GUILTY PLEA IS INVOLUNTARY AS A MATER OF LAW

In order to be valid, a guilty plea must be voluntary and intelligent, and cannot be the result of threats, misrepresentations, or improper promises. Hill v. Lockhart, 474 U.S. 52 (1985); Mabry

v. Johnson, 467 U.S. 504 (1984). Although the court previously entertained a motion to withdraw guilty plea, it was not addressed in the context of the court's improper intervention in plea negotiations which render the plea involuntary as a matter of law.

The Ninth Circuit has ruled that where comments by the district court regarding plea negotiations are all on the record, there is no factual dispute regarding their nature and challenge thereto is a question of law. United States v. Bruce 976 F.2d 552 (9th Cir. 1992)

At calendar call, the court asked the parties if the case had been resolved. Defense counsel responded in the negative. This promoted the district court to improperly interject itself into plea negotiations as follows:

THE COURT: You understand that you are looking at the death penalty.

THE DEFENDANT: Yes

THE COURT: **Twice.** And once we walk out the door there's no negotiation, we're going to trial.

THE DEFENDANT: I want it resolved, but they want me to waive my fight–

THE COURT: There won't-

THE DEFENDANT: – my appeal on–

THE COURT: **There won't be another negotiation. Do you understand? No chance.**

THE DEFENDANT: They want me to waive-

THE COURT: None.

THE DEFENDANT: They want me to waive my right, Your Honor, on another case.

THE COURT: You know what? That's up to you.

MR . PATRICK: Norman, there's no chance you're going to get any action on that direct appeal. Okay?

THE COURT: **There is no chance that you're going to get a better offer than today.**

THE DEFENDANT: If I'm not going to get no action on direct appeal, why do I have to waive that right, then? It shouldn't matter.

THE COURT: Okay.

MR. PATRICK: Okay

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THE COURT: That's your privilege to -I'm not- I don't have a dog in the fight, I don't care one way or another, I'm here for the next three weeks anyway. I've got it set for trial. But understand, you have to take a decision that you' made. Do you understand ? **No deals once I leave this room.** That's okay. Exhibit 8, pages 3-4.

Immediately after that exchange, Mr. Patrick advised the court that Flowers wanted to plead. As a matter o f law, the district court improperly pressured Flowers into taking a deal thereby rendering his guilty plea involuntary.

Under Federal Rule of Criminal Procedure 11(c) the court cannot participate in plea discussions. In federal practice there is a bright line prohibition of judicial participation in plea negotiations. United Sates v. Bruce, 976 F.2d 552 (9th Cir. 1992) Bruce holds that if the judge pressures the defendant into taking a deal, it is improper judicial intervention and the defendant is entitled to have the plea set aside.

In Cripps v. State, 122 Nev. 1187, 137 P.3d 1187 (2006) the Nevada Supreme Court adopted the federal bright-line rule prohibiting the district court from participating in plea negotiations between the State and the defense. The single exception carved out by the Nevada Supreme Court permits the district court to indicate whether or not it is inclined to follow the parties' sentencing recommendation.[1] Id.

Judicial involvement in the plea negotiations may constitute harmless error." Id. Cripps. See also NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). When conducting harmless error review, the focus is on "whether the district court's [erroneous participation] may reasonably be viewed as having been a material factor affecting the defendant's decision to plead guilty." The defendant carries the burden of establishing that any reversible error occurred." Id. Cripps.

There is no doubt the district court acted improperly under Cripps. The district court's actions were material in Flowers' decision to plead guilty. He had indicated that he was not pleading and changed his mind mere minutes after the court improperly interjected itself into the negotiations

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[1] Sentencing in state and federal court differs significantly in that in federal court, sentencing is dictated by the Federal Sentencing Guidelines.

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warning Flowers that he was facing the death penalty, that he had been offered the best deal he would get,[2] that there was no chance of a better deal and that there would be no further plea negotiations even though no such representations had not been made by the state. The district court's intervention was material in Flower's decision to plead guilty.

At the start of the hearing which took place at calender call, the parties advised the court they believed the case had been negotiated. According to defense counsel, there was one small "sticking point," Flowers wanted to speak with his mother. He was permitted to do so. The judge left the bench, prosecutors left and Flowers spoke with his mother privately in the court room. He did so for over an hour (8:40AM until 9:46 AM). When court resumed, defense counsel indicated that the matter was not resolved. After the colloquy between the court and Flowers, he changed his mind. The cause and affect is readily apparent: Flowers pled guilty because of pressure from the bench. But for the court's improper interjection into plea negotiations, he would not have pled guilty. The error is not harmless because it is clear from the record that the district court's participation was a material factor in Flowers' decision to plead guilty. See, Cripps, 122 Nev. at 771, 137 P.3d at 1192.

A plea agreement is a contract between the prosecutor and the defendant, United States v. Streich, 560 F.3d 926, 929–30 (9th Cir.2009), with the district court acting only as "a neutral arbiter of the criminal prosecution," United States v. Bruce, 976 F.2d 552, 557 (9th Cir.1992).

The risk of coercion is especially high where a district court pressures a defendant for an immediate change of his or her plea. In United States v. Anderson, the Ninth Circuit noted:

> The judge's opening pronouncement that he would not after [the date of the hearing] accept a plea to fewer than all thirty counts of the indictment and admonishment that the government was not to "make any deals," aside from constituting improper judicial intervention in the plea negotiation process, ... meant that Anderson had to decide immediately whether he wished to change the not guilty plea he had just entered to one of guilty.... [I]t is difficult to imagine how Anderson could not have felt pressured when confronted with the court's "now or never" tactics at the ... hearing. Id.

This is precisely what occurred in the case at bar; the district court told Flowers that "there won't be another negotiation ....No chance." Page 2 The court repeated this statement three times and stated "No deals once I leave this room." The risk of coercion is even higher when a defendant

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[2] The offer had not yet been placed on the record so the court was not even aware of the terms of the offer when this statement was made.

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must immediately respond to the judge's intervention on in plea negotiations. United States v. Gonzalez-Melchor, 648 F.3d 959, (9th cir. 2011) The circuit court in Anderson determined that the judge placed unreasonable restraints on Anderson's decision making process and that those constraints rendered his guilty plea involuntary. Likewise in the instant matter, the district court's intervention caused Flowers to plead guilty and rendered his Alford plea involuntary. This is evident by the fact that within days of his plea, Flowers moved to withdraw the plea. The plea was entered on June 10, 2011, he filed a motion to withdraw plea and to dismiss counsel on June 28, 2011.

Flowers previously attempted to withdraw his plea claiming it was not voluntary due to actions by defense counsel who he claimed had provided ineffective assistance of counsel. The same judge who accepted the plea canvass denied that motion.

Not only were the comments from the bench improper, likewise, the comment from defense counsel on the merits of Flowers' appeal in the companion case as follows were improper and added to the coercive nature of the plea:

> MR. PATRICK: "Norman, there's no chance you're going to get any action on the direct appeal. Okay?"

As a matter of law the guilty plea was coerced and this writ should be granted.

FLOWERS WAS NOT EFFECTIVELY REPRESENTED ON HIS MOTION TO WITHDRAW GUILTY PLEA AND APPEAL THEREFROM

Independent counsel James Oronoz[3] was appointed to represent Flowers on his motion to withdraw his guilty plea which took place prior to sentencing. He failed to address the court's improper intervention in plea negotiations. Flowers did not receive effective assistance of counsel on his motion to withdraw his guilty plea in violation of his constitutional rights.

As a result of ineffective assistance of trial and appellate counsel. Flowers' Fifth, Sixth and Fourteenth Amendment rights to due process, to counsel, and to present a defense, as well as his correlative rights under the Nevada Constitution, article 1, section 8 were violated. To prevail on

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[3] Mr. Oronoz currently represents Flowers in the companion case which is on appeal from the denial of post conviction relief.

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a claim of ineffective assistance of trial counsel, "a defendant must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052 (1984); McConnell v. State, 125 Nev. 243, 212 P.3d 307, 313 (2009). A defendant is entitled to relief where "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

As indicated herein above, the court improperly interjected itself into plea negotiations. Nevertheless, counsel failed to address this issue when he was representing Flowers on his motion to withdraw his guilty plea. There can be no strategic reason for his failure to do so. Based upon the authorities set forth herein above, had he raised the issues, Flowers would have been permitted to withdraw his guilty plea.

Counsel was also ineffective for failing to raise the issue on appeal. To state a valid claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and resulting prejudice such that any omitted issue would have had a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996) Additionally, he should have filed a motion requesting that the motion be heard by a different judge given the nature of the claim.

Additionally, defense counsel Patrick was ineffective when while the court was interjecting itself into plea negotiations he announced that Flowers had no chance on his appeal in the companion case thereby applying additional pressure which only worsened the already coercive situation.

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A petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. McConnell, 212 P.3d at 309. A petitioner must demonstrate the disputed factual allegations underlying his claims by a preponderance of the evidence. Hernandez v. State, 124 Nev. 978, 194 P.3d 1235, 1241 (2008).

POTENTIAL BRADY VIOLATIONS

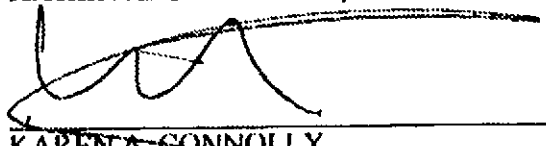
It is believed that disgraced former LVMPD crime lab technician Kristina Paulette was involved in the DNA forensic examination of evidence in this case. She was fired after she was caught covering up a mistake made during the process of analyzing DNA. Accordingly , Flowers is requesting permission to conduct discovery in regard to Paulette's involvement in the instant matter pursuant to NRS 34.780 which states as follows.

> 1. The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with NRS 34.360 to 34.830, inclusive, apply to proceedings pursuant to NRS 34.720 to 34.830, inclusive.
> 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.
> 3. A request for discovery which is available under the Nevada Rules of Civil Procedure must be accompanied by a statement of the interrogatories or requests for admission and a list of any documents sought to be produced.

If the were issues with Paulette's involvement in the instant matter which were not disclosed pre-plea, the state committed a Brady violation.

DATED this 12 day of February 2016.

KAREN A. CONNOLLY, LTD.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of KAREN A. CONNOLLY, LTD., and on the 12 day of February 2016, I served a true and correct copy of the above and foregoing ***Petition for Writ of Habeas Corpus (Post Conviction)*** pursuant to NRCP 5 by the method or methods indicated below:

☒ by depositing the same in the U.S. Mail, First Class Mail, with postage fully prepaid, at Las Vegas, Nevada, addressed as follows:

Steven B. Wolfson
Clark County District Attorney
OFFICE OF THE DISTRICT ATTORNEY
200 E. Lewis Ave.
Las Vegas, NV 89101
Attorney for Respondent

☐ by facsimile to the below-listed number:

Steven B. Wolfson
Facsimile No.: (702) 868-2415

☒ by electronic mail to the below-listed email address:

Steven B. Wolfson
Email: pdmotions@clarkcountyda.com

an Employee of KAREN A. CONNOLLY, LTD.

EXHIBIT "1"

PWHB
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DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN FLOWERS

Petitioner,

vs.

THE STATE OF NEVADA, RENEE BAKER, Warden

Respondent.

CASE NO: C228755
DEPT. NO: IX

Date of Hearing: 11-26-2012
Time of Hearing: 9:00 AM

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

1. Name of the institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: **Ely State Prison, White Pine County, Nevada.**

2. Name and location of court which entered the judgment of conviction under attack: **Eighth Judicial District Court, Clark County, Nevada.**

3. Date of Judgment of Conviction: **February 12, 2009.**

4. Case number: **C228755.**

(a) Length of sentence: **As to Count 1 – A minimum of 48 months with a maximum of 120 months; As to Count 2 – Life without the possibility of parole to run consecutive to Count 1; As to Count 3 – Life with the possibility of parole with a minimum parole eligibility after 120 months to run consecutive to Count 2.**

(b) If sentence is death, state any date upon which execution is scheduled: **N/A**

6. Are you presently serving a sentence for conviction other that the conviction under attack in this motion? **Yes.**

If yes, list crime, case number, and sentencing being served at this time:

Under case number C216032, Petitioner was convicted of two counts of First Degree Murder. As to Count 1, the court sentenced the Petitioner to Life without the possibility of parole. As to Count 2, the court sentenced the Petitioner to Life with the possibility of parole after twenty-five years. The court ordered Count 2 to run concurrent to Count 1 and the entire sentence to run consecutive to case number C228755.

7. Nature of offense involved in conviction being challenged: **Petitioner was convicted of Burglary; First Degree Murder; and Sexual Assault.**

8. What was your plea? (Check one)

(a) Not guilty X

(b) Guilty ___

(c) Guilty but mentally ill ___

(d) Nolo contendere ___

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: **Mr. Flowers plead Not Guilty to all counts throughout his prosecution and was convicted pursuant to a guilty verdict following a jury trial.**

10. If you were found guilty after a plea of not guilty, was the finding made by: (Check one):

(a) Jury X

(b) Judge without a jury ___

11. Did you testify at the trial? Yes ___ No X

12. Did you appeal from the judgment of conviction? **Yes.**

13. If you did appeal, answer the following:

(a) Name of Court: **Supreme Court of the State of Nevada.**

(b) Case number or citation: **53159 (Consolidated with case 55759)**

(c) Result: **Dismissed pursuant to a guilty plea agreement entered in case number C216032.**

(d) Date of result: **September 28, 2011.**

14. If you did not appeal, explain briefly why you did not: **N/A.**

15. Other than on direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any state or federal court? **Yes.**

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: **Eighth Judicial District Court, Clark County, Nevada.**

(2) Nature of proceeding: **Pro Per Motion to Appoint Counsel.**

(3) Grounds raised: **Assistance of counsel is necessary to investigate and develop post-conviction claims.**

(4) Did you receive an evidentiary hearing on your petition, application or motion: **No.**

(5) Result: **Granted.**

(6) Date of result: **May 30, 2012.**

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: **July 30, 2010.**

(b) (1) Name of court: **Eighth Judicial District Court, Clark County, Nevada.**

(2) Nature of proceeding: **Motion for New Trial.**

(3) Grounds raised: **After hearing the evidence pertaining to the Robbery count, the jury did not find the Petitioner of guilty of Robbery. The admission of the evidence presented on the Robbery count was overwhelmingly prejudicial to the Petitioner. Had the evidence not been admitted, there was insufficient evidence presented to find the Petitioner guilty beyond a reasonable doubt of the remaining charges.**

(4) Did you receive an evidentiary hearing on your petition, application or motion: **Yes.**

(5) Result: **Denied.**

(6) Date of result: **November 12, 2008.**

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: **November 18, 2008.**

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach. **See Exhibit A.**

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? **No.**

Citation or date of decision: **N/A.**

(2) Second petition, application or motion? **No.**

Citation or date of decision: **N/A.**

(3) Third petition, application or motion? **No.**

Citation or date of decision: **N/A.**

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.): **N/A.**

17. Has any ground being raised in this petition been previously presented to this or any other court by way of a petition for writ of habeas corpus, motion, application, or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: **N/A.**

(b) The proceedings in which these grounds were raised: **N/A.**

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.): **N/A.**

18. Any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.): **All issues have not been raised in other post-conviction proceedings. See Exhibit A.**

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.): **Yes. See Exhibit A.**

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? **No.**

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: **Deputy Special Public Defender, Clark Patrick – Trial ; Deputy Special Public Defender, Randall Pike – Trial; Deputy Special Public Defender, JoNell Thomas - Appeal**

22. Did you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? **Yes.**

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

Supporting FACTS (Tell your story briefly without citing cases or law.): **See Exhibit A.**

(a) Petitioner would respectfully raise issues as they become necessary. Petitioner would respectfully request this Court allow the undersigned to supplement this Petition.

WHEREFORE, Petitioner prays that this Honorable Court allow Thomas A. Ericsson, Esq., to Supplement this Petition.

DATED this 9 day of October, 2012.

ORONOZ & ERICSSON, L.L.C.

Thomas A. Ericsson
Nevada Bar No. 4982
700 South 3rd Street
Las Vegas, Nevada 89101
Attorney for Petitioner

VERIFICATION

Under the penalty of perjury, the undersigned declares that he is the appointed counsel for the Petitioner named in the foregoing Petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Under penalty of perjury, the undersigned declares that the Petitioner authorized him to commence this action.

Dated this 9 day of October, 2012.

THOMAS A. ERICSSON

SUBSCRIBED AND SWORN to before me
this 9TH day of October, 2012.

ALICIA M. ORONOZ
Notary Public-State of Nevada
APPT. NO. 10-2613-1
My App. Expires July 08, 2014

Notary Public in and for said
County and State

CERTIFICATE OF SERVICE

I hereby certify and affirm that I mailed a copy of the above foregoing Petition for Writ of Habeas Corpus (Post-Conviction) to counsel of record listed below October 9, 2012. Postage prepaid and addressed to the following:

STEPHEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

CATHERINE CORTEZ MASTO
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4714

By: _____
An employee of Oronoz & Ericsson, L.L.C.

EXHIBIT A

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: **Eighth Judicial District Court, Clark County, Nevada.**

(2) Nature of proceeding: **Motion for New Trial Based Upon Newly Available Evidence. Specifically, The Conviction of George Brass for Murder.**

(3) Grounds raised: **The State's initial theory was that a third party was present during the commission of the charged offenses. Evidence introduced at trial showed that George Brass had contact with the victim prior to her death. Brass testified at a hearing that the victim was strictly involved with women. Subsequent to Petitioner's trial, a jury convicted Brass of murder in another case. Following his conviction, Brass' DNA was entered into CODIS. A comparison revealed that Brass had sexual contact with the victim prior to her death. Had this information been available for impeachment purposes it is unlikely the jury would have found the Petitioner guilty beyond a reasonable doubt.**

(4) Did you receive an evidentiary hearing on your petition, application or motion: **Yes.**

(5) Result: **Denied.**

(6) Date of result: **March 17, 2010.**

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: **April 24, 2010.**

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.): **Yes.**

On June 8, 2012, the district court appointed defense counsel, James A. Oronoz, Esq., to represent Flowers in post-conviction relief proceedings. That same day, the district court set a thirty (30) day status check on receipt of Flowers' case file. On June 15, 2012, counsel contacted the Special Public Defender's (SPD) Office, who represented the Petitioner through trial and appeal, to obtain a copy of the Petitioner's file. On June 22, 2012, Deputy Special Public Defender Randall Pike informed counsel that his office mailed the original case file to Flowers and therefore could not provide a copy of the file to counsel. On July 9, 2012, counsel contacted the State in an attempt to obtain a copy of discovery in the instant case. That same day, the State informed counsel that pursuant to NRS 34.780(2), the State would not provide discovery until after a Post-Conviction Petition for Writ of Habeas Corpus had been granted.[1] On July 13, 2012, the district court directed counsel to obtain the file from Flowers, who is currently an inmate

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[1] NRS 34.780(2) provides: 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.

at Ely State Prison. In addition, the district court advised the State to provide counsel with any missing discovery.

On August 27, 2012, counsel informed the district court that obtaining the file from Flowers was problematic because Flowers only received a portion of the file. According to Flowers, the prison would not give him any documents that contained social security numbers. Flowers believed that the remainder of the file was returned to the Special Public Defender's Office. Upon inquiry by counsel, the Special Public Defender's office denied receiving any portion of the file back from Ely State Prison. After informing the Court of this dilemma, the Court signed an Order that required the State to turn over a complete copy of the discovery in its immediate and constructive possession. However, rather than comply with this Court's Order, the State directed its Discovery Division to withhold the discovery from counsel. On August 31, 2012, the State issued a setting slip requesting a hearing on "Clarification of Discovery."

On September 10, 2012, the State orally opposed providing Flowers a copy of the discovery on the basis that it did not have a chance to oppose counsel's request at the last hearing. The Court stated that it had signed the discovery Order under the belief that the State did not object to providing the discovery. The district court then vacated the Discovery Order, set a briefing schedule and extended the deadline to file the Petitioner's post-conviction petition for thirty (30) days.

On September 21, 2012, Petitioner stipulated to vacate the briefing schedule and vacate the hearing set for argument under the belief that the Nevada Supreme Court did not issue a Remittitur upon dismissing appeals 53159 and 55759. However, post-conviction counsel recently discovered a footnote in the Order Dismissing Appeals, that stated: "Because no remittitur will issue in this matter, see NRAP 42(b), the one-year

period for filing a postconviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order [September 28, 2011]."

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

Supporting FACTS (Tell your story briefly without citing cases or law.):

The Petitioner, Norman Flowers, by and through appointed counsel hereby files this petition for writ of habeas corpus pursuant to NRS 34.724. Petitioner alleges that, upon information and belief, he is being held in custody in violation of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States of America, and Articles I and IV of the Nevada Constitution. This timely first post-conviction petition for a writ of habeas corpus now follows. Mr. Flowers requests full discovery rights and an evidentiary hearing.

CLAIMS FOR RELIEF

At trial, Mr. Flowers was convicted of Burglary and the First Degree Murder and Sexual Assault of Rena Gonzales. Upon information and belief, Mr. Flowers' conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel due to his defense counsel's failure to protect his rights to a fair trial. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I.

Claim I: The Petitioner cannot investigate or develop his claims without a complete copy of discovery from the State.

Supporting Facts: As of the date of this Petition, appointed counsel does not have access to a complete copy of the discovery that the State previously provided to trial counsel. Following direct appeal, trial counsel mailed the Petitioner his file at Ely State Prison. Upon information and belief, prison officials only gave the Petitioner documents that did not contain social security numbers. Accordingly, the Petitioner is unable to verify which documents are missing. Post-conviction counsel for the Petitioner has requested a complete copy of discovery from the State.

Justification for Raising Issue in Post-Conviction Proceeding:

The Petitioner submits that without a complete copy of the discovery, post-conviction counsel cannot fully investigate and develop the Petitioner's claims. As such, post-conviction counsel cannot effectively represent the Petitioner on post-conviction relief.

Claim II: Failure to Receive Effective Assistance of Counsel – Trial Counsel

Upon information and belief, Mr. Flowers' conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel due to his trial counsel's failure to protect his rights to a fair trial. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I.

Supporting Facts:

Trial counsel failed to provide the Petitioner with a complete copy of his file. This failure has precluded post-conviction counsel and the court's ability to effectively review the validity of the Petitioner's conviction. Petitioner requests the Court's leave to further supplement this claim upon receiving a complete copy of discovery.

Justification for Raising Issue in Post-Conviction Proceeding:

Denial of fundamental constitutional rights.

Issues concerning ineffective assistance of counsel are properly raised in post-conviction proceedings.

Claim III: Failure to Receive Effective Assistance of Counsel – Appellate Counsel

Upon information and belief, Mr. Flowers' conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel due to his appellate counsel's failure to effectively appeal his conviction. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I.

Supporting Facts:

Upon information and belief, appellate counsel wrote the Petitioner a letter stating that he had a low probability of prevailing on direct appeal (Supreme Court case number 53159). Trial counsel (Deputy Special Public Defender, Clark Patrick and Special Public Defender, David Schieck) used the letter to convince the Petitioner to plead guilty in case number C216032. Pursuant to the guilty plea agreement in case C216032, Petitioner agreed to dismiss the direct appeal of his conviction in the instant matter.

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Justification for Raising Issue in Post-Conviction Proceeding:

Denial of fundamental constitutional rights.

Issues concerning ineffective assistance of appellate counsel are properly raised in post-conviction proceedings.

DATED this 9 day of October, 2012.

ORONOZ & ERICSSON, L.L.C.

Thomas A. Ericsson
Nevada Bar No. 4982
700 South 3rd Street
Las Vegas, Nevada 89101
Attorney for Petitioner

EXHIBIT "2"

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CLERK OF THE COURT

PWHB
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jim@oronozlawyers.com
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

NORMAN K. FLOWERS, Petitioner, vs. THE STATE OF NEVADA, Renee Baker, in her official capacity as the Warden of Ely State Prison; James Cox, in his official capacity as Director of the Nevada Department of Corrections; and the State of Nevada Respondents.	CASE NO. C228755 DEPT. NO. XI Date of Hearing: Time of Hearing:

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Petitioner, NORMAN K. FLOWERS, by and through his counsel of record, JAMES A. ORONOZ, ESQ., hereby files this Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) Pursuant to NRS Chapter 34. This Petition, including the following Points and Authorities, is made upon the pleadings and papers already on file, and any evidentiary hearing and oral argument of counsel deemed necessary by the Court. Petitioner, NORMAN K. FLOWERS, alleges that he is being held in custody in violation of the Fifth, Sixth, and

Fourteenth Amendments of the Constitution of the United States of America, as well as Articles I and IV of the Nevada Constitution.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT PROCEDURAL HISTORY

A. PRE-TRIAL

On December 13, 2006, the State charged Mr. Flowers by way of Indictment with the following: one count of burglary, one count of robbery, one count of first degree murder, and one count of sexual assault. The charges listed the victim as Sheila Quarles. On January 11, 2007, the State filed a notice of its intent to seek the death penalty.

On December 26, 2006, the State filed a motion to consolidate the instant case with the case in State v. Flowers, Dist. Ct. No. C216032. In that case, the State named Marilee Coote and Rena Gonzales as the victims. Id. The State filed a similar motion in case C216032. On January 2, 2007, the Defense filed an Opposition to the Motion in the instant case. At a hearing on April 13, 2007, the State informed the district court that Judge Bonaventure had denied the motion to consolidate in C216032. The district court judge, at that time Judge Mosley, expressed a desire to consolidate the cases and asked that the matter be heard before Judge Villani, who was to receive case C216032 following Judge Bonaventure's retirement.

On January 23, 2007, the Defense filed a Motion in Limine to Preclude Evidence of Other Bad Acts, seeking to exclude admission of the facts of the Coote and Gonzales case. The State filed an opposition to the Motion on February 2, 2007. On November 5, 2007, the State filed a Motion for Clarification of the Court's Ruling, seeking guidance on whether Judge Mosley's comments from the April 13, 2007 hearing had constituted a ruling permitting the State to affirmatively move to admit in the instant case evidence of Mr. Flowers' potential bad acts arising from case C216032. The Defense filed an Opposition to that Motion on November

6, 2007. Judge Bell conducted a hearing on the matter on November 15, 2007, wherein he ordered that a Petrocelli hearing be conducted to determine the admissibility of the bad acts evidence. The Petrocelli hearing occurred on August 1, 2008. Therein, the district court ruled that evidence pertaining to Mr. Flowers' possible involvement in the death of Marilee Coote was admissible in the instant case, but that evidence with respect to the Rena Gonzales investigation was not.

The district court directed that the State could present evidence from the Coote case only to demonstrate the similarities between the two cases. The district court allowed the testimony from the nurse and coroner/medical examiner concerning the manner of Coote's death, the nature of her injuries, and the DNA evidence from the Coote case.

On September 29, 2008, the Defense filed a Motion to Reconsider the district court's ruling on its Motion in Limine. While the district court denied this motion, it provided that the Defense be allowed to enter a continuing objection to the bad acts evidence. The district court further ruled that the Defense was entitled to cautionary instructions with respect to the bad acts evidence and to a relevant jury instruction at the time the case was submitted to the jury. This limiting instruction at trial took the form of an admonishment to the jury that the bad act testimony only be considered contingent upon a finding that the acts had been proven by clear and convincing evidence. The district court further admonished the jury to consider the evidence only for the purposes of determining identity, intent, motive, and absence of mistake or accident.

On July 30, 2008, several months before trial, the Defense filed a bench brief with the district court detailing the facts of the Coote and Gonzales investigations. The brief further argued that admission of the evidence from either of those cases constituted a de facto joinder solely for the purposes of creating emotional, prejudicial impact.

B. TRIAL

Trial commenced on October 15, 2008. After five days of trial, the court submitted the case to the jury. The jury returned its verdict finding Mr. Flowers guilty of first-degree murder, guilty of sexual assault, and guilty of burglary, and not guilty of robbery. During the subsequent penalty phase, the jury returned special verdicts for mitigating circumstances and imposed a verdict of life without the possibility of parole rather than death.

On October 30, 2008, following the entry of verdict, the Defense filed a Motion for a New Trial. The Motion cited as grounds for a new trial the district court's rulings allowing admission of the bad acts evidence from case C216032 and allowing admission of certain portions of Mr. Flowers' statements to police. The State filed an Opposition on November 10, 2008. The district court denied the motion on November 18, 2008.

Mr. Flowers was sentenced on January 13, 2009. The court sentenced Mr. Flowers to a term of forty-eight (48) months to one hundred twenty (120) months in prison for burglary, a consecutive term of life without the possibility of parole for first-degree murder, and a consecutive term of one hundred twenty (120) months to life in prison for sexual assault. The judgment of conviction was filed on January 16, 2009. An amended judgment of conviction was filed on February 12, 2009.

C. DIRECT APPEAL

Mr. Flowers filed a Notice of Appeal on January 26, 2009. Mr. Flowers filed an Amended Notice of Appeal on February 20, 2009. On December 21, 2009, Mr. Flowers' appellate counsel filed an opening brief with the Nevada Supreme Court, alleging the following errors:

1. The district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony;

2. The district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of Crawford v. Washington and Commonwealth v. Melendez-Diaz;

3. The district court violated Flowers' constitutional rights by allowing as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel;

4. The district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy;

5. The district court violated Flowers' constitutional right to present evidence by precluding defense witness William Kinsey from testifying that the victim told him she was seeing someone named "Keith";

6. The prosecutor committed misconduct by commenting on Flowers' right to remain silent;

7. There is insufficient evidence to support Flowers' conviction; and

8. The judgment should be vacated based on cumulative error.

The State filed an answering brief on February 19, 2010. The Defense filed a reply brief on May 3, 2010. Oral argument was held before the Northern Nevada Panel of the Nevada Supreme Court on February 15, 2011. On June 13, 2011, pursuant to a plea agreement resolving case C216032, the Defense filed a motion to voluntary dismiss the appeal, which was granted.

D. POST-CONVICTION LITIGATION

The district court appointed James A. Oronoz, Esq., to represent Mr. Flowers on June 8, 2012, in connection with this post-conviction proceeding. This Supplemental Petition now follows.

II. RELEVANT FACTS

Around 3:00 p.m., on March 24, 2005, Debra Quarles returned to her home at 1001 North Pecos Road in Las Vegas, Nevada to find her eighteen year-old daughter Sheila "Pooka" Quarles drowned in the bathtub. Grand Jury Transcript "GJT" Vol. 1 at 20-29. She also discovered that her stereo was missing from the living room. Id.

Sheila Quarles' autopsy revealed evidence of homicide and of sexual assault. GJT Vol. 1 at 38-39. Doctors took DNA from inside of her vagina for analysis. Id. Testing of the DNA revealed two separate contributors of semen. Norman Keith Flowers was determined to be a likely contributor. TT Vol. 4B at 45-48. It was later conclusively determined that Sheila Quarles' neighbor, George Brass, Jr., was the second contributor. Id.

The course of the investigation revealed that Sheila Quarles maintained several sexual relationships around the time of her death. This included a relationship with a female transit driver, Qunise Toney. GJT Vol. 1 at 13-14. Evidence also showed that Sheila Quarles told a former boyfriend, William Kinsey, that she was dating a man named Keith. TT Vol. 4B at 5-8. George Brass, Jr., a neighbor, also claims to have maintained a continuing sexual relationship with Sheila Quarles, TT Vol. 3B at 81, but Sheila Quarles' mother, Debra, could not corroborate this fact. TT Vol. 2B at 34.

Through police investigation and through testimony elicited at both the Grand Jury proceedings and at trial, evidence partially established a timeline of events during Sheila Quarles' final hours. At or around 6:30 a.m., Sheila Quarles returned to the apartment at 1001 North Pecos after spending the night with Qunise Toney. TT Vol. 2B at 45-46. Qunise Toney spoke with Sheila Quarles three or four more times throughout the day, by phone, with the last time being around 11:00 a.m. or 12:30 p.m., and Qunise Toney testified at trial that Sheila Quarles seemed to be in a "good mood." TT Vol. 2B at 152-53. Debra Quarles, the victim's mother, also spoke with her daughter five times that day by phone, later testifying that Sheila Quarles sounded "normal" each time. TT Vol. 2B at 16. Debra Quarles last spoke with Sheila Quarles around 1:00 p.m. During that conversation, the phone went dead. When Debra tried to call back, no one answered. Id. At or around 1:35 p.m., Qunise Toney received a call from

Sheila Quarles' phone, but when she answered, no one was on the line. Qunise Toney's return call went straight to voicemail. TT Vol. 2B at 161.

In the afternoon, Debra Quarles returned to the apartment complex. TT Vol. 2B at 19-22. Debra Quarles estimated the time as being around "three something." Id. Robert Lewis, a neighbor[1] who was apparently watching out of the window, came down to help. Id. The front door to the Quarles' apartment was closed but not locked, which was unusual because. Sheila Quarles habitually locked the door while home alone. Id. As described above, upon entering the apartment Debra Quarles immediately noticed that the stereo in the living room was missing. Id. She went to her bedroom and noticed that her room was "messed up." Id. She also heard the sound of water dripping in the bathroom and went to turn it off. Id.

Debra Quarles walked into the bathroom, pulled back the shower curtain, and found Sheila Quarles' body face-up in a full tub of water. TT Vol. 2B at 22-23. During this time, Robert Lewis had been waiting in the living room, but came to help Debra Quarles pull Sheila out of the water. Id. At that point, Debra Quarles left the apartment to pick up her son, Ralph, who was working nearby. TT Vol. 2B at 24. Robert Lewis also left the apartment, told neighbors that Sheila Quarles needed help, and someone called 911. TT Vol. 2A at 121.

When Debra returned, police and paramedics had already arrived at the apartment and were beginning their investigation. TT Vol. 2B at 24. The first officer on the scene was Officer Brian Cole, who estimated at trial that he arrived at the apartment at or around 2:50 p.m. TT Vol. 2A at 108. He found Sheila's body lying on the floor and secured the scene. TT Vol. 2A at 109-111. Debra provided the officers the following information: the pillow cases were missing from the pillows in her bedroom, Sheila's bank card and cellular phone were missing, jewelry and CDs were missing, and, as mentioned before, the stereo that had been in the living room was missing. TT Vol. 2B at 26. She also supplied the name of Qunise Toney as the only person she could imagine who could have been involved in Sheila's death. TT Vol.2B at 25.

Several other people spoke with police officers at the scene. Qunise Toney, who had been told about Sheila's death, arrived at the apartment and spoke to the police. TT Vol. 2B at 156.

[1] Robert Lewis is also the uncle of George Brass, Jr.

George Brass, Jr., who also had been told of Sheila's death, arrived at the apartment and spoke briefly with an officer. TT 3B at 91. Brass did not mention anything to the officer about having been inside the apartment earlier that day or about having sex with Sheila earlier that day. Id.; TT Vol. 2B at 115.

Homicide Detective James Vaccaro responded to the scene as the homicide supervisor. TT Vol. 2B at 69. He concluded that there was no sign of forced entry into the apartment. TT Vol. 2B at 74. He discovered Sheila's clothing underneath where her body had been lying in the bathroom. TT Vol. 2B at 89. Her underwear had apparently been placed on the outside of the jeans and backwards. Id. As described above, analysts eventually discovered DNA from two male sources on Sheila's underwear collected at the crime scene. TT, Vol. 4B at 45-48. At trial, Vaccaro agreed that "women can have sex with people consensually and later get murdered and there is not necessarily a sexual component to the homicide." TT, Vol. 2B at 128.

Crime scene analysts collected twenty-one (21) samples for fingerprint analysis and found fingerprints on nine (9) of those samples. TT Vol. 2B at 190. They did not attempt to take any prints off of Sheila's body. TT Vol. 2B at 96-97. Not a single fingerprint from Norman Flowers was found in the apartment. TT Vol. 2B at 194-95.

Police never recovered the items that were missing from the apartment, including the stereo or Sheila's bankcard. TT Vol. 3B at 73; TT Vol. 4A at 67. While Sheila's cellular phone was not recovered, officers were able to obtain phone records for her phone number. TT Vol. 3B at 70-71. The last calls recorded were an outgoing call to Qunise's number around 1:35 p.m. and a similar incoming call just prior to Qunise's call. Id.

Further police investigation and testimony at trial placed several people around the Quarles' apartment the day of Sheila's murder. Robert Lewis, George Brass. Jr.'s uncle, testified that he had seen Brass at the apartment complex around lunch time the day Sheila was killed. TT Vol. 2B at 61. He estimated the time as being around 11:20 or 11:30 a.m. Id. According to George Brass' testimony at trial, he had been around the apartment complex only briefly in the late morning, and then had gone to work at the Wal-Mart near Craig and Martin Luther King in Las Vegas. TT Vol. 3B at 82. Brass claimed that his shift was to begin at 11:45 a.m., and he stated

that he arrived at work on time or close to on time. TT Vol. 3B at 83. At trial, the State called Gabriel Ubando, an assistant manager at the Wal-Mart on Craig and Martin Luther King, who testified that the comings and goings of Wal-Mart employees are traced by badges that they carry with them, which must be swiped when leaving and returning. TT Vol. 3B at 97-100. According to Ubando, Wal-Mart records show that Brass clocked into work at 12:04 p.m., clocked out for lunch at 4:04 p.m., returned at 5:03 p.m., and left at 7:45. Id. The records do not reflect the time that Brass left work to return to Sheila's apartment after her death, a period in which he acknowledges he did not clock out, but he claims he told his supervisor leaving was necessitated by the emergency at the Quarles' apartment. TT Vol. 3B at 89-91.

Further, Debra told Detectives about an older man who had recently moved into the apartment complex. TT Vol. 2B at 36. She told them that he had recently been released from prison. Id. She made the investigators aware that, on one occasion about a month prior to Sheila's death, the man had knocked on the Quarles' apartment door and had asked Debra's younger daughter, Miracle, to go get Sheila. TT Vol. 2B at 36-38. Debra had told the man how old Sheila was and had told him to stay away from their house. Id. After Sheila's death, she gave police the man's name, Darnell, along with a physical description. Id. Detectives Long claims to have "run . . . down" that lead and it had "turned out to be nothing." TT Vol. 4A at 70.

Robert Lewis was also known to have been hanging around the apartment the day of Sheila's death. When police responded to the scene, Lewis voluntarily gave a DNA sample and spoke with police for approximately an hour, but the police did not take a written statement. TT Vol. 3B 26-27. The Defense was able to uncover evidence that Robert Lewis frequently sold items at pawn shops, including women's jewelry. TT 4A at 13-16. However, the jury was not allowed to hear this evidence at trial.

Lewis also testified about seeing one of his nephews, Anthony Culverson, around Sheila's apartment the day of Sheila's death TT Vol. 2B at 62. Lewis testified at trial that he had previously noticed Culverson interacting with Sheila, and that Culverson's interactions had prompted Lewis to tell him "she was a youngster, he shouldn't be trying to talk to her like that." TT Vol. 2B at 63.

Natalie Sena was also a resident of the apartment complex where the Quarles lived in March of 2005. TT Vol. 4B at 104. She told police that, on the day Sheila died, she had seen a tall, skinny man in a flannel shirt near the Quarles' apartment. TT Vol. 4B at 106-07. She also thought she remembered seeing George Brass, Jr., known to her as "Chicken," before and after 12:00 p.m. TT Vol. 4B at 108. She testified at trial that she had seen Brass with the other tall skinny man. Id. She also testified that, after 12:00 p.m., she had seen the tall skinny man knocking on Sheila Quarles' door or just coming out of her apartment. Id. She described his manner as "creeping." Id.

At the time of Sheila's death, Natalie Sena was living in the apartment above Sheila's with a man named Jesus Navarro. TT Vol. 4B at 110. She testified at trial that, two or three days after Sheila's death, she saw Jesus (sometimes called "Jesse") outside of her apartment with a "radio" with "detachable speakers." Id. Sena testified that she had asked Navarro where he got the "radio" and that he had told her that he got it "from the apartment downstairs, the girl's downstairs apartment." TT Vol. 4B at 111.

Veronica Sigala, the assistant manager at the apartment complex, also testified about her interactions with Navarro. TT Vol. 4B 130-35. She had seen him break into apartments around the complex. She had told him to leave the property seven or eight times and had called the police on him three or four time. Id.

Martha Valdez, also a resident at the apartment complex at the time of Sheila's death, testified at trial about a man who had broken into her home after midnight shortly after she had moved in. TT Vol. 4B 139-41.

Detective George Sherwood was one of the police investigators assigned to work on the case under Detective Vaccaro. TT Vol. 4A at 40. He would later testify as to how investigators developed Mr. Flowers as a suspect. Sherwood was aware that the DNA recovered from Sheila's underwear and genitals pointed to the presence of two different male DNA profiles. TT Vol. 4A at 70. Part of the DNA recovered from Sheila's genitals and underwear was matched with DNA records from Flowers already in the laboratory's "CODIS" database. TT Vol. 4A at 71. Sherwood was made aware of this information on August 22, 2006. Id. Thereafter, Mr.

Flowers was treated as a suspect. Sherwood remembered another homicide detective handling a case with a suspect also named Norman Flowers. TT Vol. 4A at 72. That case also involved a sexual assault and murder.[2] Id.

Dan Long, a detective with the Las Vegas Metropolitan Police Department's Gang Unit, was also involved in the investigation of Sheila Quarles' death. TT Vol. 3B at 16. He would later describe at trial the means by which investigators came to suspect that George Brass, Jr., was the second contributor to the DNA samples retrieved from Sheila's vagina and underwear. TT Vol. 3B at 40. Long explained how he had found through one source that Sheila "had been talking to a man by the name of Chicken." TT Vol. 3B at 41. Long determined that a man nicknamed "Chicken" resided in the same apartment complex as Sheila, and that his real name was George Brass, Jr. TT Vol. 3B at 41-42.

At that time, Brass was in custody at Clark County Detention Center. Long spoke with Brass, and Brass admitted both to having been in the apartment the day Sheila was killed and to having sex with her. TT Vol. 3B at 96.

Q- "Without saying what he specifically said, did Mr. Brass agree to speak with you about Sheila Quarles and his relationship with her?"

A- "Yes, he did."

Q- "Could he have refused to speak with you at that point?"

A- "Absolutely."

Q- "Could he have told you that I don't want to talk to you at all, I want my lawyer, I don't want to talk to you?"

A- "Yes."

Q- "He didn't do that?"

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[2] Prior to trial, the State proposed to admit the facts of the investigation in a companion case, involving a victim named Marilee Coote, to demonstrate "identity, motive, knowledge, intent, [and] absence of mistake" in the instant case. The defense argued for its exclusion based on the fact that it is unproven bad act evidence, and on the catastrophic prejudicial effect the admission of other unproven allegations of sexual assault and murder would have on Flowers' case. See **Defendant's Motion in Limine to Preclude Evidence of Other Bad Acts and Motion to Confirm Counsel, June 23, 2007; Defendant's Motion to Reconsider the Ruling on Defendant's Motion in Limine to Preclude Evidence of Other Bad Acts, September 29, 2008.** Substantial evidence was introduced in Mr. Flowers' trial purportedly connecting Mr. Flowers to the Coote murder and purportedly showing similarities between the Coote case and Sheila Quarles' case.

A- "No."

TT Vol. 3B at 41-43.

Brass would later testify at trial that he had been inside the Quarles' apartment and had had sex with Sheila the day she died, at around 10:30 a.m. TT Vol. 3B at 82. He testified that they had had sex on the living room floor and that he had been inside the apartment "[m]aybe 20 minutes at the most." TT Vol. 3B at 87-88. The levels of DNA evidence in Sheila's vagina and underwear were "pretty much even" as to both Flowers and Brass. TT Vol. 4B at 68. The detectives became aware of this fact only a few months before Mr. Flowers was to go on trial.

After matching Mr. Flowers' DNA to the DNA found in Sheila's vagina and underwear, police approached Flowers and interviewed him about the case. TT Vol. 4A at 81 et seq. Flowers was in custody at the time on another matter. Id. During the course of this interview, Flowers sought to invoke his right to remain silent, explaining that he did not want to "get involved in anybody else's matters." TT Vol. 4A at 87. The interrogation continued anyway. Id. At trial, the Defense unsuccessfully sought to exclude the testimony drawn from Flowers after his invocation of his right to remain silent. TT Vol. 5 at 121. The court admitted this evidence. Id.

At trial, the doctor who performed Sheila Quarles' autopsy, Dr. Ronald Knoblock, did not testify, although the results of the autopsy were clearly an essential part of the State's case. Instead, the State called medical examiner Lary Simms, who presented Dr. Knoblock's findings, despite the fact that Dr. Knoblock resided in Las Vegas, Nevada at the time of the trial. Further, the DNA analyst who performed some of the DNA analysis central to the State's case in the Marilee Coote investigation, Thomas Wahl, was also not called. Instead, Kristina Paulette testified about DNA examinations that Wahl had performed. Both instances were clear violations of Flowers' rights to due process, confrontation, and cross-examination of witnesses. In spite of this, trial counsel failed to object to either the testimony of Dr. Simms or of Ms. Paulette.

Dr. Simms testified to the results of the autopsy. TT Vol. 2A at 46 et seq. He testified that Sheila had been asphyxiated, caused by strangulation to her neck. TT Vol. 2A at 51, 54. He

concluded that the absence of ligature marks indicated likely manual strangulation. TT Vol. 2A at 54-55. He also noted that the autopsy results showed bruising on Sheila's abdomen, an abrasion on her knee, and lacerations in the vaginal area. TT Vol. 2A at 51. He stated his opinion that the tearing in the lining of the vagina were consistent with forcible penetration, as would occur in a sexual assault. TT Vol. 2A at 51-52. He also stated his belief that the lacerations had occurred prior to her death, within an hour of death. TT Vol. 2A at 52. He acknowledged that semen inserted into a vagina can remain for a period of time and that the presence of DNA inside the vagina of a sexual assault and murder victim does not necessarily mean the deposit of that semen was contemporaneous with a sexual assault. TT Vol. 2A at 97-98. He also acknowledged that it is not scientifically possible, where the semen of two different men is identified inside a vagina, to determine which was deposited first without more evidence than was available in this case. TT Vol. 2A at 98-99.

Dr. Simms also testified that there had been a fresh hemorrhage to the right side of Sheila's scalp that was consistent with blunt force trauma (TT Vol. 2A at 56), as well as frothy fluid in her airway, which he stated could be a sign of drowning. TT Vol. 2A at 60. Dr. Simms recited Dr. Knoblock's conclusion that Sheila's cause of death had been drowning, with strangulation as a contributing factor. TT Vol. 2A at 68. Flowers did not contest the cause of death. Defense counsel properly objected, therefore, when the State sought to introduce numerous gruesome photos from the autopsy, which included a photograph of Sheila's tongue after it had been removed from her body. TT Vol. 2A at 61-68. Over defense objection, the district court admitted the photographs as exhibits 93 – 108. TT Vol. 2A at 61-62.

Kristina Paulette testified at trial as to her own DNA analysis and as to analysis performed by another DNA expert, Thomas Wahl. TT Vol. 4B at 30, 48. As described above, trial counsel failed to object to Ms. Paulette's testimonial hearsay statements regarding the work of Mr. Wahl, who was not present to present his own findings. Ms. Paulette described to the jury that DNA samples taken from Sheila's vagina revealed the presence of DNA from two separate males. TT Vol. 4B at 36, 41-42. Paulette explained how her first tests had first revealed Mr. Flowers as a possible contributor to one of the male DNA profiles but that, later, in 2008, she

was given a buccal swab from George Brass, Jr., and determined that Brass was a likely contributor to the other male DNA profile. TT Vol. 4B at 40, 46.

During direct examination, the State elicited improper vouching testimony from Detective Vaccaro regarding the State's essential witness, George Brass, Jr.:

Q- "Now, if Mr. Brass—or assuming Mr. Brass admitted or told detectives that he had sexual contact with Miss Quarles on the day of her death, the room or the location that the intercourse took place wouldn't be particularly relevant in the investigation, would it, if it was a consensual relationship?"

A- "Not with regard to that sexual contact with regard to Mr. Brass."

Q- "Okay. So if he said that he had sex with her on the floor of one of the rooms in Debra Quarles' apartment, knowing that doesn't necessarily tell you who killed Sheila Quarles later on?"

A- "I think that the correct answer to that would be that it wasn't important until we knew more about that sexual activity and whether or not he was a suspect in our case. So I don't know if that's a confusing answer, but when we learned about him as a suspect or not a suspect in our case, when he did not develop as a suspect in our case, then that location that the consensual sex took place wasn't of any importance to us."

Q- "I mean—yeah, I guess that's my question." It doesn't tell you any more about the investigation or how she was killed if he says I had sex with her on the living room floor, on the kitchen floor or on the bedroom floor? That doesn't tell you anything about who killed Sheila Quarles, does it?"

A- "No. I mean, he could have said he had sex with her at a location other than the apartment even, for that matter. The fact that he said that he had sexual contact with her, but then showed additional information—or additional investigation showed us that he wasn't a suspect in that, where they had sex wasn't of importance to us; and, at that point, I think that was beyond my time there anyway. So in my experience, that wouldn't have been important to me."

Q- "And the fact that someone has sex with another individual on a floor or on a

carpet, that wouldn't necessarily mean that sperm or some kind of DNA would end up on the carpet by virtue of the sexual activity, would it?"

A- "No. But I guess we could say that depending upon the positioning of the two individuals having sex, you could make a conclusion whether or not there was some deposit of semen on the surface that they were having sex on. So I don't really know how to answer that."

Q- "Maybe, maybe not?"

A- "It doesn't mean it's always going to be there."

TT Vol. 2B at 130-131.

At several stages during trial, the State's attorneys also improperly commented on Flowers' decision not to testify and not to speak with detectives during interrogation:

> When Christina Paulette tested the swabs that were taken from Sheila's vagina and from her panties, whose DNA did she find? She found George Brass, the person who came in here, swore to tell the truth, and told you yeah, I had sex with Sheila that day. I had sex with her in the morning, and then I went to work. He didn't have to tell you that, but he did.
>
> Now, George Brass was spoken to by the police. He could have said no, I'm not talking, I have nothing to say. Remember he's in custody. But he voluntarily spoke to the police and said, yeah, I had sex with her and then I went to work. George Brass who was in custody could have said hell, no, I'm not giving you a DNA sample, but he did. He voluntarily gave a DNA sample.
>
> If he had not told them, yeah, I had sex with her that day, if he had not given a sample, we would be in the same place we were six months ago, a year ago, two years ago, three years ago and have no idea who the other sample was.
>
> George Brass who has nothing to gain by being cooperative and basically everything to lose because the truth, and in fact, his DNA is found in the vagina of a girl who had just been murdered.
>
> He voluntarily gave a statement, gives a sample and then comes in here to testify. He had nothing to hide. He told us that he was at the apartments that morning, he told us that he was living there, but he saw Sheila that morning, he went into her apartment and he had sex with her he thought between 10:30, 11 o'clock and then went to work.

TT Vol. 5 at 50-51.

> Well, what happens when the police finally show up on George Brass's door step? He tells them, yeah, I've had a sexual assault with Sheila that's been going on a long time. He doesn't ask for a lawyer, he doesn't ask to remain silent. He's sitting in custody, but when the police come and ask him, he gives it up. He says I had this relationship...
>
> And certainly when you have Brass's demeanor and his willingness to cooperate with the police, you can pretty much disregard that as rank speculation, which you're not supposed to do in this case.

TT Vol. 5 at 118-20.

After five days of trial, the court submitted the case to the jury. The jury deliberated for over 24 hours before returning its verdict, finding Mr. Flowers guilty of first-degree murder, guilty of sexual assault, and guilty of burglary, and finding him not guilty of robbery. During the penalty phase, the jury returned special verdicts for mitigating circumstances and imposed a verdict of life without the possibility of parole, rather than death.

Mr. Flowers was sentenced on January 13, 2009. The court sentenced Mr. Flowers to a term of forty-eight (48) months to one hundred twenty (120) months in prison for burglary, a consecutive term of life without the possibility of parole for first-degree murder, and a consecutive term of one hundred twenty (120) months to life in prison for sexual assault.

III. GROUNDS FOR RELIEF

LEGAL AUTHORITY RELEVANT TO ALL CLAIMS

A conviction cannot stand when defense counsel provides ineffective assistance of counsel. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I. Counsel is ineffective when (1) his performance is deficient, such that counsel made errors so serious he ceased to function as the "counsel" guaranteed by the Sixth Amendment, and (2) when the deficiency prejudiced the defendant, such that the result of the trial is rendered unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The question of whether a defendant has received

ineffective assistance at trial is a mixed question of law and fact and is subject to independent review. State v. Love, 109 Nev. 1136-38, 865 P.2d 322, 323 (Nev. 1993).

Performance of trial counsel will be judged against the objective standard for reasonableness, and is deficient when it falls below that standard. State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (Nev. 2006); Means v. State, 120 Nev. 1001, 103 P.3d 25 (Nev. 2004). Where trial counsel might claim that an action was a strategic one, the reviewing court must satisfy itself that the decisions were, indeed, reasonable. Strickland, 466 U.S. at 691.

Prejudice to the defendant occurs where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (Nev. 1996). A "reasonable probability" is one sufficient to undermine confidence in the outcome. Id.

With respect to post-conviction habeas corpus petitions, all factual allegations in support of an ineffective assistance of counsel claim need only be proven by a preponderance of the evidence. Powell, 122 Nev. at 759.

ARGUMENT

1. Trial counsel was ineffective for failing to object to the improper testimony of a State's witnesses testifying as to the results of work performed by other experts, in violation of Crawford v. Washington.

The Confrontation Clause guarantees that "testimonial" out-of-court statements of a witness are barred unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity to cross-examine. U.S. Const. amend. VI; Crawford v. Washington, 541 U.S. 36, 53-54 (2004). A testimonial statement is "a declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 51. There are a "core class of testimonial statements" which include (1) ex-parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, or similar pretrial statements that a

declarant would reasonably expect to be used for prosecution; (2) extrajudicial statements contained in formal testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances where it is reasonable to believe the statement will be available for later use at trial. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (citing Crawford, 541 U.S. at 51-52).

Additionally, a forensic report prepared for the purposes of aiding a police investigation epitomizes the definition of "testimonial." Bullcoming v. New Mexico, 131 S.Ct. 2705, 2717-2718 (2011). The Court in Crawford made clear that the "core class" of testimonial statements was not intended to be a comprehensive definition of what qualifies as "testimonial" (Crawford, 541 U.S. at 68), meaning that even statements falling outside of the core class may still be testimonial such that the protections of the Confrontation Clause are invoked. The Bullcoming Court explicitly stated that surrogate testimony of forensic laboratory reports do not meet the Confrontation Clause requirements:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce **a forensic laboratory report containing a testimonial certification---made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test** reported in the certification. **We hold that surrogate testimony of that order does not meet the constitutional requirement.** The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. Bullcoming, 131 S.Ct. at 2710.

Under this clear standard, a prosecutor *cannot* introduce forensic evidence through a surrogate expert without analyzing whether the defendant cross-examined the original expert prior to trial because introducing that evidence explicitly violates the defendant's rights under the Confrontation Clause.

In Melendez-Diaz, the Supreme Court found that the admission of laboratory analysts' affidavits without the presence of the analysts who prepared the affidavits at trial violated the defendant's right to confront the witnesses against him. Melendez-Diaz, 557 U.S. at 329. The Court concluded that "[a]bsent a showing that the analysts were unavailable to testify at trial and that [the petitioner] had a prior opportunity to cross-examine them, [the petitioner] was entitled to be confronted with the analysts at trial." Id. at 311. Accordingly, in Bullcoming, the Court explained that laboratory and forensic reports constituted testimonial evidence because a surrogate witness could not convey the original observations outlined in the document. Bullcoming, 131 S.Ct. at 2715. As a result, the defendant would not be able to expose any lies, bias, subjectivity, unreliability, or inconsistencies with the reports as created by the original preparer, which facially and effectively deprives the defendant of his constitutional right to cross-examine the witness who created a testimonial piece of evidence against him. Bullcoming, 131 S.Ct. at 2715-2716. (See also, Melendez-Diaz, 557 U.S. at 321).

The *only* method to circumvent the defendant's right to confront the preparer of a laboratory or forensic report would be to show that the witness was unavailable to testify at trial *and* to show that the defendant had a prior opportunity to cross-examine that witness. Melendez-Diaz, 557 U.S. at 309. Without *both* of these elements, a testimonial statement cannot be introduced to a jury unless the defendant has the opportunity to cross-examine the original witness. Crawford, 541 U.S. at 68. (See also, Melendez-Diaz, 557 U.S. at 309).

The rationale for this rule stems from the fact that human nature encompasses subjectivity, bias, and unreliability. Melendez-Diaz, 557 U.S. at 321. Also, "[t]here is a wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material." Melendez-Diaz, 557 U.S. at 320-321 (Citing National Academy Report S-5). As a

result, scientific inquiry, although generally methodological, does not always maintain perfect objectivity, which further strengthens a defendant's need to cross-examine the witnesses that the State presents. Id. at 321.

Additionally, a prosecutor cannot claim that a forensic report or affidavit should be admissible as a business record without confrontation. Melendez-Diaz, 557 U.S. at 321.

> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. **But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.** Melendez-Diaz, 557 U.S. at 321 (internal citations omitted).

The Court has also concluded that business records, as most other hearsay exceptions, are not testimonial by nature. Id. at 324. Therefore, business records that are not testimonial do not generally require confrontation because they are "created for the administration of an entity's affairs" rather than for the use of proving a fact at trial. Id. at 324.

a. Failure to object to testimonial autopsy reports

Here, Dr. Knoblock's autopsy report constituted testimonial evidence. First, the autopsy report clearly served as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51. Additionally, any expert report "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" constitutes a testimonial report. Melendez-Diaz, 557 U.S. at 311 (citing Crawford, 541 U.S. at 52). Accordingly, Dr. Knoblock conducted an autopsy on Ms. Quarles, deduced that her death occurred by homicide, and subsequently prepared a report. Any objective witness would reasonably believe that an autopsy report indicating *homicide* as a method of death would be subject to later use in a criminal trial.

Because Dr. Knoblock's autopsy report constituted testimonial evidence, the parties should have analyzed (1) whether Dr. Knoblock was unavailable to testify at trial, and (2) whether Mr. Flowers had a prior opportunity to cross-examine Dr. Knoblock as a witness.

Dr. Knoblock left the Clark County Medical Examiner's office shortly after preparing Ms. Quarles' autopsy report, but Dr. Knoblock remained in Las Vegas, Nevada, as a practicing physician. Also, the record does not reflect that the State offered any reasonable explanation for Dr. Knoblock's absence at trial. Instead, the State called Dr. Simms to testify to the contents of the autopsy report prepared by Dr. Knoblock. A critical fact that is beyond dispute is that Dr. Simms was not present during the autopsy, nor did he have any personal knowledge of the contents of the report. Thus, it would have been virtually impossible to confront any issues pertaining to subjectivity, bias, methodology, or unreliability. Quite simply, Dr. Simms testified to a report for which he did not have the authority or the knowledge to answer for Dr. Knoblock's methodology, subjective opinion, or bias.

Additionally, Mr. Flowers did not have any prior opportunity to cross-examine Dr. Knoblock as a witness. Although the State offered Dr. Simms as a witness to testify to the contents of Dr. Knoblock's report, the fatally defective confrontation issues presented by this constitutionally deficient practice remain.

Dr. Knoblock's autopsy report should not have been admissible as evidence at trial because the admission of that report violated Mr. Flowers' Sixth Amendment right to confront Dr. Knoblock as a witness against him. Despite these facts, Mr. Flowers' trial counsel did not object to the admission of Dr. Simms' testimony of presenting the findings contained in Dr. Knoblock's report.

///

i. Deficient performance

Trial counsel was ineffective by failing to object to Dr. Simm's testifying about Dr. Knoblock's autopsy reports. Here, the autopsy reports referenced by Dr. Simms at trial were clearly testimonial. Therefore, they were inadmissible at trial without the presence of the original author of the reports or without a prior opportunity for cross-examination, pursuant to Melendez-Diaz and Crawford. Mr. Flowers did not have the opportunity to cross-examine Dr. Knoblock at either the preliminary hearing or at trial, and the State did not offer an explanation for Knoblock's absence. The U.S. Supreme Court's holding in Melendez-Diaz clearly compels the exclusion of his autopsy reports.

Knowing the importance of the autopsy reports to the State's case, a reasonably prudent attorney should have taken steps to prevent testimony regarding the autopsy reports at trial. Further, any reasonably prudent attorney should object when the Defendant suffers a denial of his Sixth Amendment Right to Confrontation. A failure of this magnitude certainly rises to the level of an error that impacted the outcome of the trial. In essence, trial counsel's failure to object to Dr. Simms' testimony regarding the autopsy records prepared by Dr. Knoblock unequivocally constituted deficient performance. As such, protecting this right is a mandatory function of representing a criminal defendant. In this light, trial counsel's performance fell below the objective standard of providing counsel as required by the Sixth Amendment.

ii. Prejudice

Mr. Flowers suffered prejudice because the proper exclusion of the State's autopsy evidence would have reasonably resulted in a different outcome such that this error of trial counsel effectively undermines confidence in the outcome of the verdict. Trial counsel's failure to object generally precluded Mr. Flowers' ability to raise the issue on appeal without a showing of plain error. Flores v. State, 121 Nev. 706, 722, 120 P.3d 1170, 1180-81 (Nev. 2005). That

fact alone shows that Mr. Flowers suffered irreparable prejudice. Not only did trial counsel fail to object, but trial counsel also failed to inquire as to Dr. Knoblock's unavailability at trial. Trial counsel should have known that confronting a witness is an essential right afforded to the defendant by the Constitution. Because of trial counsel's failure to protect Mr. Flowers' constitutional right to confront Dr. Knoblock as a witness against him, Mr. Flowers was forced to appeal the issue on the grounds of plain error. Mr. Flowers should not have suffered this prejudice resulting from a blatant constitutional violation. Because of the deficiency in the performance and the prejudice, trial counsel stripped Mr. Flowers of his Constitutional right to effective assistance of counsel.

b. Failure to object to DNA evidence

Mr. Wahl's DNA report pertaining to the Coote case constituted testimonial evidence. First, the DNA report "created solely for an 'evidentiary purpose'" and "made in aid of a police investigation" was a "declaration or affirmation made for the purpose of establishing or proving some fact." Bullcoming, 131 S.Ct. at 2717, Crawford, 541 U.S 53-54. (See also, Melendez-Diaz, 557 U.S. at 311). Additionally, any report that would "lead an objective witness reasonably to believe that the statement would be available for use at a later trial," constitutes a testimonial report. Melendez-Diaz, 557 U.S. at 311 (Citing Crawford, 541 U.S. at 52).

In Bullcoming, the United States Supreme Court determined that laboratory and forensic reports, such as DNA reports, constitute testimonial evidence. This means that surrogate experts cannot convey the original observations contained in the report. Bullcoming, 131 S.Ct. at 2715. In this case, the prosecutor introduced the testimony of Ms. Paulette, who was the original DNA examiner for Ms. Sheila Quarles' case. However, the prosecutor also introduced Ms. Paulette's testimony regarding the Merilee Coote case, for which Mr. Flowers was not on trial. In this case, Ms. Paulette testified about the contents of a DNA report prepared by Mr. Wahl for the

Coote case. However, Mr. Wahl was the original preparer for the DNA report in Ms. Coote's case. As a result, Ms. Paulette was not present at the time that Mr. Wahl created the original DNA report for Ms. Coote's case.

These undisputable facts show that Mr. Wahl's DNA report constitute testimonial evidence subject to the Confrontation Clause requirements. Bullcoming, 131 S.Ct. at 2713-2714. However, the prosecutor in this case introduced Ms. Paulette as someone qualified as a custodian of records to review records kept during the normal course of business for the DNA laboratory. Pursuant to Melendez-Diaz, the DNA report, like other forensic reports, cannot constitute business records that are exempt from the Confrontation Clause requirements because they were prepared in conjunction with a criminal investigation and created to prove a fact at trial. Melendez-Diaz, 557 U.S. at 324 (See also, Bullcoming, 131 S.Ct. at 2714; Conner v. State, 130 Nev. Adv. Op. No. 49, 63 (2014) (Gibbons, C.J., concurring)).

Because the report should have been subject to the Confrontation Clause requirements, the parties should have analyzed (1) whether Mr. Wahl was unavailable to testify at trial, and (2) whether Mr. Flowers had the prior opportunity to cross-examine Mr. Wahl as a witness.

The record does not reflect any information regarding Mr. Wahl's availability. The State did not offer any explanation for his absence at trial. The State simply began to ask Ms. Paulette to interpret and to testify regarding the contents of Mr. Wahl's report, but Ms. Paulette was not present when Mr. Wahl conducted his report. Although Ms. Paulette conducted an independent examination of the DNA results after Mr. Wahl conducted his examination, Ms. Paulette had no authority to testify to the contents of Mr. Wahl's report because Mr. Wahl's report clearly constituted testimonial evidence, which may have contained subjective, biased, or unexplainable methodologies.

i. Deficient performance

Trial counsel failed to protect Mr. Flowers' constitutional right to confront a witness against him. Trial counsel objected to the admission of Mr. Wahl's report on hearsay grounds. However, Melendez-Diaz clearly states that forensic reports do not constitute business records under the hearsay exception. Therefore, forensic reports fall within the reach of the Confrontation Clause. As such, trial counsel failed to protect Mr. Flowers' Sixth Amendment right to confront Mr. Wahl as a witness because Mr. Wahl prepared the original DNA report.

In addition, Mr. Flowers did not have an opportunity to cross-examine Mr. Wahl at either the preliminary hearing or at trial. Nor did the State offer an explanation for Mr. Wahl's absence. The U.S. Supreme Court's holding in Melendez-Diaz clearly compels the exclusion of his DNA testing report because the defendant did not have an opportunity to cross-examine the scientist who created the reports. Accordingly, Mr. Flowers' trial counsel raised an objection which the United States Supreme Court has deemed inapplicable. The real violation at play constituted a blatant violation of Mr. Flowers' Sixth Amendment rights.

Because of the importance of the DNA to the State's case against Flowers with respect to the Coote murder, a reasonably prudent attorney should have taken steps to prevent testimony concerning that evidence at trial. Further, any prudent attorney should object when the Defendant is being subjected to a denial of his Sixth Amendment Right to Confrontation. In this light, failure to object properly to Ms. Paulette's testimony regarding the DNA records prepared by Mr. Wahl constituted deficient performance on the part of trial counsel.

ii. Prejudice

Mr. Flowers suffered prejudice because the exclusion of Mr. Wahl's DNA report would have substantially affected the outcome of the trial. Trial counsel's failure to raise the correct objection cost Mr. Flowers a denial of his constitutional right to confront Mr. Wahl as a witness.

Trial counsel's error created a reasonable probability that "but for counsel's errors, the result of the trial would have been different." Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (Nev. 1996). Trial counsel's failure to object generally precluded Mr. Flower's ability to raise the issue on appeal without a showing of plain error. Flores v. State, 121 Nev. 706, 722, 120 P.3d 1170, 1180-81 (Nev. 2005). That fact alone shows that Mr. Flowers suffered irreparable prejudice. Trial counsel's failure substantially affected Mr. Flower's constitutional rights under the Sixth Amendment. As such, Mr. Flowers suffered irreparable prejudice due to trial counsel's failure to provide reasonably competent assistance. In light of these facts, trial counsel was ineffective for failing to object to inadmissible evidence, thereby depriving Mr. Flowers of a fundamental right to confront witnesses against him.

II. Trial counsel was ineffective for failing to object to the prosecution's improper vouching for the credibility of its own witness.

Nevada law requires that "[i]t is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony." DeChant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000), (Citing Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994)). Furthermore, a prosecutor may not vouch. Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004).[3] A prosecutor vouches when the "prosecution places " 'the prestige of the government behind the witness'" by providing "'personal assurances of [the] witness's veracity.'" Browning, 120 Nev. at 359. (Citing U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992); U.S. v Roberts, 618 F.2d 530, 533 (1980)).

The Nevada Supreme Court has expressly adopted the Ninth Circuit's logic, "Analysis of the harm caused by vouching depends in part on the closeness of the case." Lisle v. State, 113

[3] See also, Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). "A prosecutor may not vouch for the credibility of a witness or accuse a witness of lying."

Nev. 540, 553, 937 P.2d 473, 481 (1997); (Citing U.S. v. Frederick, 78 F.3d 1370, 1378 (9th Cir. 1996); Ref. Roberts, 618 F.3d at 534). Likewise, "If the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-119 (2002). (Citing, Garner v. State, 78 Nev. 366, 374, 374 P.2d 525m 530 (1962). Therefore, the closer the case, the more significant the issue of vouching becomes to reviewing courts, and the more likely that reversal for vouching is appropriate.

Prejudicial prosecutorial misconduct occurs when "a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). (Citing Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)). In order to evaluate prosecutorial misconduct, the Nevada Supreme Court has adopted a two-step analysis to determine the propriety of a prosecutor's conduct: (1) determine "whether the prosecutor's conduct was improper," (2) determine "whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).[4]

In Lisle, the prosecutor inadvertently suggested that his essential witnesses were credible. Lisle, 113 Nev. at 553. Therefore, the prosecutor cannot suggest that the "prestige of the government" supports the credibility of the witnesses in any way, even when the nature of that testimony is critical to the prosecutor's case. Lisle, 113 Nev. at 553. In Rowland, the

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[4] The Ninth Circuit expressly states, "'As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses.' Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony. **'Vouching is especially problematic in cases where the credibility of the witnesses is crucial, and in several cases applying the more lenient harmless error standard of review, [courts] have held that such prosecutorial vouching requires reversal.'**" U.S. v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993). (Internal citations omitted).

prosecutor labeled one witness as "a man of integrity" and "honor." Rowland, 118 Nev. at 39. The court held,

> **"Calling a witness a person of integrity and honor is indeed commenting on the character of the witness and vouching for the testimony given.** This characterization of the witness's testimony **'amounts to an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence.'** This argument was prosecutorial error. 'Many strong adjectives could [have been] used [to describe the testimony] **but it was for the jury, and not the prosecutor, to say which witnesses were telling the truth...**'" Rowland, 118 Nev. at 39.

In both Lisle and Rowland, the prosecutors improperly used the "prestige of the government" to support the credibility and veracity of their witnesses.

In Anderson, the prosecutor impermissibly undermined the testimony of a defense witness by accusing him of lying. Anderson, 121 Nev. 511, 516-517. The Court held that the prosecutor's statements, "[the defendant's son] 'couldn't not look at [him] and lie to [him],' and that Anderson and his son had years to 'cook up a story and they did,'" affected the defendant's substantial rights. Anderson, 121 Nev. at 517. In Valdez, during jury selection, the prosecutor remarked that the defendant was on a "man hunt" before his arrest. Valdez, 124 Nev. 1190. The court held that the prosecutor's reference to a "man hunt" was improper prosecutorial conduct because "A prosecutor may not 'blatantly attempt to inflame a jury.'" Valdez, 124 Nev. 1191. (Citing Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985)).

Here, the prosecutors used the prestige of the government to give credit to a very incredible and vulnerable essential State witness. The prosecutors used the testimony of two detectives in their closing arguments to vouch for Mr. Brass's credibility. Ironically, at the same time, Mr. Brass was defending his own very serious charges of murder, attempt murder, and robbery. Mr. Brass has since been convicted of murder with use of a deadly weapon, attempt murder with use of a deadly weapon, conspiracy to commit robbery, robbery with a deadly

weapon, and attempt robbery with a deadly weapon. Thus, the State found itself in the unenviable position of attempting to utilize the testimony of a witness whom, in a different courtroom, in the same courthouse, they were also trying to convict and incarcerate with life without parole.

In addition, during the direct examination of Detective James Vaccaro, the prosecutor vouched to the jury that Mr. Brass should not have been considered a prime suspect to the murder and sexual assault. Detective Vaccaro retired in 2007, but Mr. Brass did not admit to having sex with the victim until a detective approached him in 2008. Accordingly, Detective Vaccaro did not have any personal knowledge regarding Mr. Brass's admission because Detective Vaccaro had already retired at the time of Mr. Brass's admission. Therefore, the prosecutor used the prestige of the government when it used Detective Vaccaro's position as a representative of law enforcement to make Mr. Brass's story more believable.

Additionally, the prosecutor questioned Detective Dan Long about his in-custody conversation with Mr. Brass. During this testimony, the prosecutor asked Detective Long about Mr. Brass's willingness to speak about Ms. Quarles.

Q- "Without saying what he specifically said, did Mr. Brass agree to speak with you about Sheila Quarles and his relationship with her?"

A- "Yes, he did."

Q- "Could he have refused to speak with you at that point?"

A- "Absolutely."

Q- "Could he have told you that I don't want to talk to you at all, I want my lawyer, I don't want to talk to you?"

A- "Yes."

Q- "He didn't do that?"

A- "No."

TT Vol. 3B at 41-43.

Although the prosecutor asked simple questions, these questions have a dire effect when viewed in light of the closeness of the case. As the court has stated, "Analysis of the harm caused by vouching depends in part on the closeness of the case." Lisle, 113 Nev. at 553. This line of questioning directly relates to the prosecution's vouching for Mr. Brass as their essential witness. Logically, the prosecutor wanted to establish that Mr. Brass could not have possibly lied about his involvement in the victim's murder because he truthfully told Detective Long that he had sex with her on the morning that she was murdered. Like the prosecutor in Lisle, the prosecutor here used tactics to establish a false sense of credibility.

During the State's closing arguments, the prosecutor explicitly vouched for Mr. Brass' credibility. The prosecutor labeled Mr. Brass as a man who "had nothing to hide," which is certainly not the position of the District Attorney's office when they prosecuted Mr. Brass for murder in a separate case. Additionally, the prosecutor compared Mr. Brass' willingness to be open and testify to Mr. Flowers' wish to invoke his right to silence. As a result, the prosecutor's cutting statements "so infected the proceedings with unfairness as to result in a denial of due process."

Each of these examples shows a common thread in the prosecutor's strategy—the prosecutor used her power as a government agent to vouch for Mr. Brass' credibility in order to obtain a conviction. In reality, the vouching had everything to do with the fact that the State wanted to convict Mr. Flowers, so they created a fake sense of "credibility" to purport the story of their essential witness.

Under the Valdez standard, the reviewing court should first determine that the prosecutor's conduct was improper. This determination is not difficult. The prosecutors in this case had no

reason to believe that Mr. Brass showed any sort of credibility, and therefore, they had no basis for which to use Mr. Brass' testimony to elicit an emotional response from the jury and to inflame the jury.

The second determination under Valdez requires the court to determine whether the improper conduct requires reversal. In this case, there should be no other remedy. The prosecutor used one of the victim's lover's testimony to implicate and convict another of the victim's lovers. Again, it bears repeating that the prosecutors absolutely vouched in the closing arguments, which created the false and erroneous illusion that Mr. Brass was someone to be trusted.

This was a very close case. Mr. Brass and Mr. Flowers each had sex with the same girl the day she died. When presenting that odd scenario, the State impermissibly and illegally resorted to vouching in order to convict Mr. Flowers.

a. Deficient Performance

Trial counsel's performance fell deficient by allowing the prosecutor to vouch for a witness. The law clearly states that prosecutors cannot use the prestige of the government to vouch for any witness. However, trial counsel in this case did not object to the State's continued vouching for Mr. Brass' credibility.

The serious nature of this error created a situation in which trial counsel failed to act as Mr. Flower's counsel. By allowing the State to vouch, Mr. Flowers' trial counsel allowed the State to fabricate a credible witness. The vouching inevitably poisoned the jury to such an extent that the jury could not have made any other determination as to the outcome because the defense did not undermine the credibility of the witness.

Under State v. Powell, trial counsel's performance must be judged for deficiency against an objective standard for reasonableness. State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458

(Nev. 2006). Judging Mr. Flowers' trial counsel's performance against *any* standard of reasonableness shows deficiency. Trial counsel failed to recognize the State's vouching tactics, and as such, allowed the jury to hear about a completely incredible and vulnerable essential witness.

b. Prejudice

Mr. Flowers suffered prejudice as a result of trial counsel's failure to object to the State's vouching. Trial counsel allowed the prosecutors to inject a sense of credibility to a very incredible and vulnerable witness. The jury had no choice but to believe the evidence presented.

The prejudice in this case stems from trial counsel's failure to object to the State's systematic vouching. The State did not simply vouch one time. The State blatantly vouched at least three times. Trial counsel should not have allowed the State to use improper vouching without raising the appropriate objections.

CONCLUSION

For the reasons stated above, Flowers' conviction is unconstitutional under the federal and state constitutions for each of the reasons stated herein. Mr. Flowers' judgment of conviction must therefore be vacated.

DATED this 7th day of July, 2014.

ORONOZ & ERICSSON LLC

/s/ James Oronoz
James A. Oronoz, Esq.
Nevada Bar No. 6769
700 South Third Street
Las Vegas, Nevada 89101
Attorney for Petitioner

VERIFICATION

Under the penalty of perjury, the undersigned declares that he is the retained counsel for the petitioner named in the foregoing Petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Under penalty of perjury, the undersigned declares that the Petitioner authorized him to commence this action.

Dated this 7 day of July, 2014.

JAMES A. ORONOZ

SUBSCRIBED AND SWORN to before me
this 7th day of July, 2014.

Notary Public in and for said
County and State

ALICIA M. ORONOZ
Notary Public-State of Nevada
APPT. NO. 10-2513-1
My App. Expires July 08, 2014

CERTIFICATE OF SERVICE

I hereby certify and affirm that on the 7th day of July, 2014, I served a true and correct copy of the above foregoing Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) to the Clark County District Attorney's Office by sending a copy via electronic mail to:

CLARK COUNTY DISTRICT ATTORNEY
pdmotions@clarkcountyda.com

I further certify that on the 7th day of July, 2014, I deposited in the United States Post Office at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the foregoing Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), addressed to the following:

RENEE BAKER
Warden
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

CATHERINE CORTEZ MASTO
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4714

By: */s/ Rachael Stewart*
An employee of JAMES A. ORONOZ, ESQ.

EXHIBIT "3"

RSPN
STEVEN B. WOLFSON
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Attorney for Plaintiff

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS,
aka Norman Harold Flowers III, #1179383

Defendant.

CASE NO: 06C228755

DEPT NO: XI

STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: NOVEMBER 24, 2014
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through PAMELA C. WECKERLY, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Petition For Writ Of Habeas Corpus (Post-Conviction).

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On December 13, 2006, a Grand Jury issued an Indictment on NORMAN KEITH FLOWERS, aka Norman Harold Flowers III (hereinafter "Defendant") for the following: COUNT 1 – Burglary (Felony – NRS 205.060); COUNT 2 – Murder (Felony 200.010, 200.030); COUNT 3 – Sexual Assault (Felony – NRS 200.364, 200.366); and COUNT 4 – Robbery (Felony – NRS 200.380). The victim named in the Indictment was Sheila Quarles.

On December 26, 2006, the State filed a Motion to Consolidate seeking to consolidate this case with District Court Case Number C216032. The motion was also filed in Case Number C216032. In Case Number C216032, Defendant was charged with two (2) counts of murder (and other charges) for the deaths of Marilee Coote and Rena Gonzales. The Defendant filed an Opposition on January 2, 2007. 1 AA 21-29. On January 8, 2007, District Court Judge Joseph Bonaventure, sitting judge for Case Number C216032, denied the State's motion. On January 11, 2007, the State filed a Notice of Intent to Seek Death Penalty in this matter. 1 AA 30-34.

On January 23, 2007, Defendant filed a Motion in Limine to Preclude Evidence of Other Bad Acts and Motion to Confirm Counsel. 1 AA 35-46. In his motion, Defendant sought to keep out evidence of the Gonzales and Coote murders and to confirm attorney Brett Whipple as his counsel. The State filed an opposition on February 2, 2007. On February 5, 2007, the Court denied Defendant's motion to confirm counsel but did not address the prior bad acts. See Reporter's Transc. of Def.'s Mot. in Limine (Feb. 5, 2007).[1] On November 5, 2007, the State filed a Motion for Clarification of Court's Ruling seeking to clarify if they could introduce evidence of the murders charged in Case Number C216032 at trial in this matter. The Defendant filed an opposition on November 6, 2007. On November 15, 2007, the Court ordered a Petrocelli hearing on the bad acts that State wanted to introduce at trial. See Transc. of Proceedings: State's Mot. for Clarification (Nov. 15, 2007).[2]

[1] This transcript was filed on November 28, 2010.
[2] This transcript was filed on July 30, 2008.

On August 1, 2008, a Petrocelli hearing was conducted. See Recorder's Transc. of Petrocelli Hearing (Aug. 1, 2008).[3] The State sought to introduce evidence from Case Number C216032. Id. The Court found that the murder and sexual assault of Coote was sufficiently similar in nexus and time to Sheila Quarles murder. Id. at 52. The court also found that there was clear and convincing evidence that the Defendant sexually assaulted and murdered Coote. See Id. Finally, the Court found that probative value for purposes of intent and identity was not outweighed any unfair prejudice. See Id. Therefore, the Court held that evidence regarding the similarities between the Coote and Quarles murders was to be allowed at trial. Id. However, the Court denied admission of evidence of the Rena Gonzales murder at trial. Id.

An Amended Indictment was filed on October 15, 2008, alleging the same charges as set forth in the Indictment. On October 22, 2008, pursuant to a jury verdict, Defendant was found guilty of COUNTS 1, 2 and 3, i.e., Burglary; First-Degree Murder and Sexual Assault, respectively. Defendant was found not guilty of COUNT 4 – Robbery. On October 24, 2008, following a penalty hearing, the jury imposed a sentence of LIFE Without the Possibility Of Parole for COUNT 2. On October 30, 2008, Defendant filed a Motion for New Trial alleging insufficient evidence. On November 10, 2008, the State filed an Opposition. The Court denied this Defendant's motion on November 12, 2008.

On January 13, 2009, Defendant was sentenced as follows: as to COUNT 1 – to a maximum of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC) with a minimum parole eligibility of FORTY-EIGHT (48) MONTHS; as to COUNT 2, to LIFE Without the Possibility Of Parole, to run consecutive to COUNT 1; as to COUNT 3, to LIFE With the Possibility Of Parole after ONE HUNDRED TWENTY (120) MONTHS, to run consecutive to COUNT 2. The Judgment of Conviction was filed on January 16, 2009, erroneously noting as to COUNT 3, a sentence of LIFE *Without* the Possibility Of Parole, with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS. On January 29, 2009, Defendant appeared in court with counsel pursuant to the

[3] This transcript was filed on August 26, 2008.

State's request for clarification of the sentence. An Amended Judgment of Conviction was filed February 12, 2012 to reflect the true sentence of LIFE *With* the Possibility Of Parole with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS for COUNT 3.

On January 26, 2009, Defendant filed a Notice of Appeal from the Judgment of Conviction. On February 20, 2009, Defendant filed an Amended Notice of Appeal.

On March 5, 2010, Defendant filed a Motion for New Trial Based upon Newly Available Evidence, i.e., George Brass' conviction for murder in Case Number C253756 which, if available, could have been used to impeach Mr. Brass' testimony at Defendant's trial. On March 9, 2010, the State filed an opposition. At a hearing on March 17, 2010, the State argued that Defendant went to trial knowing that the trial of Mr. Brass was pending. Recorder's Transc. of Def.'s Mot. for New Trial at 3 (Mar. 17, 2010).[4] The State further argued that Mr. Brass had an alibi at the time of Sheila's murder, which was verified by work records. Id. The Court denied the Motion for New Trial. Id. at 4. On April 1, 2010, Defendant filed a Notice of Appeal from the Court's denial of his Motion for New Trial.

On June 10, 2011, pursuant to negotiations, Defendant entered an Alford plea to an Amended Indictment in Case Number C216032, which charged Defendant with two (2) counts of First-Degree Murder for the deaths of Marilee Coote and Rena Gonzales.[5] Pursuant to the plea negotiations, Defendant agreed to withdraw his appeals in this case which were pending before the Nevada Supreme Court; i.e., Flowers v. State, Docket # 53159 (Appeal from the Judgment of Conviction); and Flowers v. State, Docket # 55759 (Appeal from the District Court's order denying Defendant's motion for new trial). On June 13, 2011, Defendant filed a Motion to Voluntarily Dismiss his Appeal in each of these cases.

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[4] This transcript was filed on March 23, 2010.

[5] Prior to sentencing in Case Number C216032, Defendant moved to withdraw his Alford plea. The Court denied the motion and sentenced Defendant to LIFE Without the Possibility of Parole on COUNT 1; and LIFE with the Possibility of Parole after TWENTY-FIVE (25) YEARS on COUNT 2, COUNT 2 to run concurrent with COUNT 1, and both to run consecutive to the sentence imposed in this case. Defendant appealed the Judgment of Conviction, arguing that the District Court abused its discretion by denying his presentence motion to withdraw his guilty plea. On December 13, 2012, the Nevada Supreme Court affirmed the Judgment of Conviction, finding no abuse of discretion. Flowers v. Nevada, Docket #59250 (Order of Affirmance, Dec. 13, 2012). Remittitur issued January 9, 2013.

On September 28, 2011, the Supreme Court issued an Order Dismissing Appeals in Docket # 53159 and Docket # 55759. That order stated, "[b]ecause no remittitur will issue in this matter, see NRAP 42(b), the one-year period for filing a post-conviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order."

On May 16, 2012, Defendant filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing, seeking the appointment of counsel to in the preparation of a post-conviction petition for writ of habeas corpus. On May 30, 2012, the court granted Defendant's motion. On June 8, 2012, James A. Oronoz was appointed as post-conviction counsel.

At a status check on July 13, 2012, defense counsel advised the Court he still had not obtained Defendant's file. See Court Minutes (July 13, 2012). Counsel attempted to file a Motion for Leave to Conduct Discovery and for Court Order to Obtain Requested Documents and Evidence, in open court, but was instructed by the Court to file the motion electronically. Id.

On August 27, 2012, defense counsel advised the Court he was still not in possession of Defendant's file. See Court Minutes (Aug. 27, 2012). Counsel presented the Court with an Order which was signed in open court, ordering the District Attorney's Office to provide Defendant with a copy of discovery.

On September 10, 2012, before the time to file the post-conviction petition expired in this case, i.e., September 28, 2012, the parties appeared in court at the State's request for a clarification of the August 27 discovery order. That day, counsel acknowledged that any post-conviction petition must be filed by September 28, 2012: "The problem we have here is that the petition in this case is due on September 28th . . . [i]t's due from the – when the remittitur issued, and that was September 28, 2011 of last year." Trans. of Proceedings: Clarification of Disc. at 4-5 (Sept. 10, 2012).[6] Notwithstanding his acknowledgment of the deadline, defense counsel made an oral motion to extend the timeline for the filing of Defendant's post-

[6] This transcript was filed on November 20, 2012.

conviction petition. Id. at 7. When counsel made the oral motion, the State mistakenly indicated that the deadline in this case had not yet started running. Id. The court then held:

> I agree with you. I'll extend it 30 days. If the District Attorney is correct and it hasn't started ticking yet, then there's zero prejudice to the District Attorney in me extending that deadline 30 days. So, your oral request is granted.

Id. at 8. The Court also noted that when it signed the discovery order on August 27, 2012, it had not realized there would be an objection by the State to providing discovery. Id. at 7. Accordingly, the Court vacated the discovery order signed on August 27, 2012, and ordered briefing on the matter. Id. at 7-8.

On October 9, 2012, Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction). On October 30, 2012, the State moved to dismiss Defendant's petition as untimely. On October 31, 2012, Defendant filed a Motion to Place on Calendar to Supplement Defendant's Petition for Writ of Habeas Corpus. On November 2, 2012, State filed an opposition to Defendant's Motion to Place on Calendar. On November 23, 2012, Defendant filed a reply to State's opposition.

On September 12, 2012, prior to the filing of Defendant's petition, Defendant filed a Motion to Obtain a Complete Copy of Discovery from the State. On December 14, 2012, the State filed an opposition. In its opposition, the State noted that NRS 34.780(2) provides that post-conviction discovery only becomes available after the writ has been granted and upon a showing of good cause. The State further argued that Defendant's petition should not be granted because it was untimely filed. The State urged the Court to resolve the pending motion to dismiss Defendant's post-conviction petition before potentially ordering the State to provide post-conviction discovery.

On January 16, 2013, the Court heard argument on Defendant's discovery motion. The next day, the district court issued a minute order. See Court Minutes (Jan. 17, 2013). The Court found: 1) NRS 34.726 does not address instances where a pending appeal is dismissed and no remittitur is issued from the Nevada Supreme Court; 2) even assuming NRS 34.726 applied, there was good cause to overcome the procedural bar because post-conviction

counsel had been "unable to obtain a copy of his file for reasons outside of his control;" 3) the Court's September 17, 2012 Order granting an extension created prejudice; and 4) Defendant's filing of the petition within eleven (11) days of the deadline was reasonable. Id. The minute order noted that the discovery issue would be addressed at the next scheduled hearing on March 6, 2013.[7] Id. The instant case was reassigned to Department 11 on January 22, 2013.

On March 5, 2013, the State filed a Renewed Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). On March 20, 2013, the Court ordered supplemental briefing as to Defendant's post-conviction petition. Following a stipulation by the parties to extend the briefing schedule, Defendant filed the instant Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on July 7, 2014.

II. STATEMENT OF FACTS

A. Background Facts

On the afternoon of March 24, 2005, Debra Quarles ("Debra") returned to her apartment located at 1001 North Pecos Road. Reporter's Trans. of Jury Trial, Volume 2-B at 5, 18-19 (Oct. 16, 2008) ("TT 2B"). Debra shared the apartment with her daughter, Sheila Quarles ("Sheila"). Id. at 5-6. Debra had been grocery shopping and upon her return, she honked her horn to get Sheila out of the apartment to help with the groceries. Id. at 19. One (1) of Debra's neighbors, Robert Lewis ("Robert") came downstairs and helped Debra with her grocery bags. Id. When Debra reached the front door of her apartment, she noticed that the door was closed but not locked. Id. at 19-20. Robert followed Debra into the apartment with some grocery bags and waited in the living room as Debra searched for Sheila. Id. at 20-21. Debra walked into the apartment and noticed that her new stereo was missing. Id. at 20. Debra called out for her daughter but received no response. Id. She noticed that her bed was "messed up" and heard a water dripping in the bathroom. Id. Eventually, Debra made her way to the bathroom to turn the water off. Id. Inside the bathroom, Debra noticed that the shower curtains were pulled shut. Id. at 21. Debra pulled the curtain back to find her

[7] At a hearing on March 6, 2013, the State represented that the Court granted Defendant's discovery motion and agreed to provide discovery. However, the State asserted that it was not waiving the issue of untimeliness. See Court Minutes (Mar. 6, 2013).

daughter Sheila submerged in the bathtub with part of her face sticking out of the water. Id. at 21-22. Debra noticed that the water in the bathtub was still very hot. Id. at 22. Debra became hysterical. Id. at 56. Robert lifted Sheila out of the bathtub. Id. at 23. A friend or family member covered up Sheila's naked torso area before the police arrived at the scene. Id. at 85-86, Reporter's Trans. of Jury Trial, Volume 2-A at 123-24 (Oct. 16, 2008) ("TT 2A"). Robert went next door to his mother's apartment, and told his family members that Sheila needed help. TT 2A at 121-22. Someone from that apartment called 9-1-1. Id. at 125-26. Hysterical, Debra left the scene to get her son Ralph, who lived close to the apartment. TT 2B at 23-24. Robert's niece and others went to Sheila's apartment and stayed there on the phone with the 9-1-1 operator until police got to the apartment. TT 2A at 123-217. Paramedics arrived at the apartment but it was too late for them to render any aid or to revive Sheila. Id. at 110-111.

B. Dr. Simms' Testimony

Dr. Lary Simms, a forensic pathologist with the Clark County Coroner's Office testified regarding Sheila's injuries, which he determined based a review of Sheila's autopsy report as well as photographs taken at Sheila's autopsy. TT 2A at 46-106. The autopsy report in this case was prepared by Dr. Thomas Knoblock, a forensic pathologist who was no longer employed with the Coroner's office at the time of Defendant's trial. Id. at 49-50. Dr. Simms testified that Sheila suffered internal injuries. Id. at 51-60. Sheila had two (2) hemorrhages on her right scalp which indicated she suffered a blunt force injury to her head. Id. at 56-57. Dr. Simms also testified that Sheila had been asphyxiated; i.e., manually strangulated, and that there were tears on her vagina consistent with sexual assault. Id. at 51-52, 55. The injuries to Sheila's neck were consistent with someone applying pressure with his hands with the intent to cause injury. Id. at 57. Additionally, small hemorrhages in Sheila's eyes indicated that pressure was applied to her neck which led to a buildup of blood in the veins that burst. Id. at 53-54

Based on his review of the autopsy photographs, Dr. Simms opined that Sheila's injuries were contemporaneous with her death. Id. at 56-57.

Lastly, Dr. Simms testified that Sheila had a "frothy fluid" in her airways which is a sign of drowning. Id. At 60. Dr. Simms stated that Dr. Knoblock's opinion as to Sheila's cause of death was drowning with strangulation being a contributing factor. Id. at 68. Based on his review of Dr. Knoblock's report and the autopsy photographs, Dr. Simms testified that he agreed with Dr. Knoblock's opinion.

Dr. Simms also testified regarding the autopsy photographs and his interpretation of the injuries displayed therein. Id. at 63-69. When the State sought to admit the photographs into evidence, Defendant's trial counsel objected noting that the cause of death was not being contested. Id. at 61-62. The Court overruled counsel's objection and the photographs were admitted. Id. Counsel then objected to the nature of the photographs, but the Court again overruled counsel's objection. Id. at 62.

Dr. Simms also testified about Marilee Coote's autopsy, the victim in Case Number C216032. Marilee suffered several injuries to her neck, similar to Sheila, which indicated that she was manually strangled. Id. at 71. The neck injuries were consistent with someone applying pressure to inflict injury. Id. at 77. Also similar to Sheila, Marilee suffered injuries to her head from blunt trauma contemporaneous with the time of her death. Id. at 76. Moreover, like Sheila, Marilee had injuries to her vaginal area indicating that she was sexually assaulted. Id. at 75.

C. **Ms. Paulette's Testimony**

The State called Kristina Paulette, a forensic scientist / DNA analyst, with the Las Vegas Metropolitan Police Department. Reporter's Trans. of Jury Trial, Volume 4-A at 30 (Oct. 20, 2008) ("TT 4B"). Ms. Paulette testified that she was personally involved in the investigation into Sheila's homicide as well as that of Marilee Coote. Id. at 33.

At Sheila's autopsy, Ms. Paulette collected DNA samples from semen found in Sheila's vaginal area and on her underwear. Id. at 36. From this sample, Ms. Paulette was able to generate a DNA profile. Id. Initial testing revealed a mixture of at least three (3) individuals including that of the victim and two (2) unknown males. Id. at 36-38. Ms. Paulette entered the unknown DNA profiles into the DNA database, CODIS. Id. at 38-39.

As a result, the database revealed Defendant as a potential match. Id. Defendant's DNA profile was subsequently collected. Id. at 39-40. Ms. Paulette determined that Defendant's DNA matched the sample she retrieved at Sheila's autopsy. Id. at 41-42. More specifically, Ms. Paulette testified that the DNA did not exclude Defendant as a match but did exclude 99.99 percent of the remaining population. Id. at 42, 45-46.

Ms. Paulette also testified that she analyzed a buccal swab obtained from George Brass and that his DNA was also present in the samples retrieved at Sheila's autopsy.[8] Id. at 46-47.

The State also questioned Ms. Paulette regarding the findings of Thomas Wahl in conjunction with a vaginal swab taken from Marilee Coote at her autopsy. Id. at 48. Defense counsel objected on the basis of hearsay and conducted a brief voir dire of Ms. Paulette. Id. at 48-49. Ms. Paulette testified that the report generated by Mr. Wahl, in conjunction with Marilee's autopsy, was a business record and that she was qualified to testify as a custodian of records. Id.

As to Marilee, Ms. Paulette testified that Defendant was the source of the semen taken from Marilee's vaginal swab. Id. at 49. In Marilee's case, the DNA profile was rarer than one in 650 billion. Id. at 51. The same result issued regarding a rectal swab taken at Marilee's autopsy. Id. at 52. Mr. Wahl's report also indicated that Defendant's DNA matched DNA retrieved from a section of carpet taken from underneath Marilee's deceased body. Id. at 52-53, see Reporter's Trans. of Jury Trial, Volume 3-B at 16-21, 39-40 (Oct. 17, 2008) ("TT 3B") Ms. Paulette also testified to own her findings regarding the carpet sample. TT 4B at 53. Specifically, when Ms. Paulette was testing for the presence of semen on the carpet sample, her testing revealed the presence of detergent. See Id. at 53. However, despite the presence of detergent, Ms. Paulette determined that Defendant's DNA was present, within a statistical probability of one in 650 billion. Id.

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[8] Brass testified at trial that he had an ongoing sexual relationship with Sheila and that they had consensual sex on the morning of her murder. TT 3B at 81-82.

ARGUMENT

I. DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DISMISSED AS UNTIMELY PURSUANT TO NRS 34.726

As the State argued at length in its Renewed Response and Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction), filed on March 5, 2013, and hereby incorporated by reference, Defendant's Petition is untimely and should be dismissed pursuant to NRS 34.726.

Neither the Court nor the parties were empowered to extend the one-year time frame in the instant case. State v. Dist. Ct. (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005) ("[T]he statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State."), State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003) ("[A] stipulation by the parties cannot empower a court to disregard the mandatory procedural default rules.").

Here, the Supreme Court order, filed on September 28, 2011, explicitly advised Defendant that "[b]ecause no remittitur will issue in this matter, see NRAP 42(b), the one-year period for filing a post-conviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order." Flowers v. State, Docket # 55759 (Order Dismissing Appeals, Sept. 28, 2011). Accordingly, Defendant had until September 28, 2012 to file a post-conviction petition. Defendant's petition was not filed until October 9, 2012. As Defendant fails to demonstrate good cause to overcome the time bar, his petition must be dismissed pursuant to NRS 34.726. The State notes that failure to receive Defendant's file in a timely manner is not good cause to overcome the time bar. Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

However, to the extent the Court is inclined to consider the merits of Defendant's petition, the State responds as follows.

II. DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffective assistance of trial counsel a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test

of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 104 S. Ct. at 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

"Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2052). Furthermore, bare or naked allegations, which are unsupported by specific facts, are insufficient to grant relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is within the range of competence demanded of attorneys in criminal cases." Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (internal quotation omitted).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2052). "A reasonable probability is a probability

sufficient to undermine confidence in the outcome." McNelton, 115 Nev. at 403, 990 P.2d at 1268 (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2052).

A. Defendant's Trial Counsel was not Ineffective for Failing to Object to the Testimony of Dr. Simms and Ms. Paulette

The Sixth Amendment provides that, "[I]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S.Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). Thus, testimonial hearsay - i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony - may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S.Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 51-52, 60 n.9, 124 S.Ct. at 1369 n.9 (citing, Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 2081-82 (1985)).

Appellant relies on Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), and Bullcoming v. New Mexico, 564 U.S. ___, 131 S.Ct. 2705 (2011), to argue that Dr. Simms' and Ms. Paulette's testimony was inadmissible in violation of the Confrontation Clause. AOB, p. 40. However, both Melendez-Diaz and Bullcoming are distinguishable from the instant case as they involved the admission of a forensic or written report. In Bullcoming, the trial court admitted a laboratory report of a non-testifying analyst that reflected the defendant's blood alcohol content. 564 U.S. at ___, 131 S.Ct. at 2709. In Melendez-Diaz, the trial court admitted three (3) certificates of analysis from a state laboratory which analyzed the substance seized by the defendant, concluding the substance was cocaine. 557 U.S. at 308, 129 S.Ct. at 2531. Defendant's case does not involve the

admission of another scientist's report.[9] As a result, this case is fundamentally distinguishable from Melendez-Diaz, and Bullcoming. Furthermore, neither Melendez-Diaz nor Bullcoming addressed autopsy reports or DNA reports nor did these cases determine whether the prosecution could introduce an analyst's testimonial forensic report (or transmit its substance) through an *expert* witness, as was done in the instant case. See Notice of Expert Witnesses (Nov. 2, 2007).

1. Dr. Simms testimony regarding Sheila's autopsy

Defendant alleges that his trial counsel was ineffective for failing to object to Dr. Simms testimony as it related to the findings contained in Dr. Knoblock's autopsy report. Petition at 20-22. Defendant's claim is without merit.

In U.S. v. De La Cruz, 514 F.3d 121 (1st Cir. Feb 01, 2008), the Court held that:

> An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of Crawford.

The State recognizes that the holding in De La Cruz, is not universally accepted. Notably however, the Nevada Supreme Court has not ruled on whether an autopsy report is testimonial pursuant to Crawford nor has this issue been disposed of by the United States Supreme Court. See Malone v. State, 281 P.3d 1197 (Nev. 2009) (citing the split in authority and declining to address this issue), but see Conner v. State, 130 Nev. Adv. Op. 49, 327 P.3d 503, 511 (2014) (Gibbons, C.J., concurring) (expressing concern with the State's introduction of statements and opinions delineated in an autopsy report, through the testimony of a doctor who did not prepare the report).

The State contends that an autopsy report is not testimonial in nature and therefore, Dr. Simms' testimony as to anything therein did not violate Crawford. Namely, autopsy reports are the product of an official duty imposed by law, rather than a product of criminal

[9] The Court emphasized in Melendez-Diaz that their concern was with the *admission* of written certificates because they were used in lieu of live, in court testimony. 557 U.S. at 310-311, 128 S.Ct. at 2532.

investigation for use at trial. NRS 259.050 describes the duties of coroners. "When a coroner or the coroner's deputy is informed that a person has been killed, has committed suicide or has suddenly died under such circumstances as to afford a reasonable ground to suspect that the death has been occasioned by unnatural means, the coroner shall make an appropriate investigation." NRS 259.050(1) (emphasis added). The coroner does not have discretion to conduct an autopsy only when the death has been the result of a criminal act. They must conduct an autopsy anytime a death has occurred by unnatural means. In Boorman v. Nevada Memorial Cremation Society, 126 Nev. Adv. Op. 29, 236 P.3d 4, 9 (2010), the Court stated, "A county coroner is obligated to perform its services...the county coroner's duty is to investigate the cause of death..." Unlike the reports held testimonial in Melendez-Diaz and Bullcoming, autopsy reports are generated regardless of any request by law enforcement and are not produced solely or even primarily for purposes of gathering evidence for a future criminal prosecution.[10] In fact, autopsies are conducted in many cases that do not involve a subsequent prosecution. See Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 2221, 2251 (2012) (Breyer, J. concurring) ("[a]utopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial").

In Nardi v. Pepe, 662 F.3d 107, 111–12 (1st Cir.2011), the First Circuit acknowledged the uncertainty of the holding De La Cruz in light of the holdings in Melendez-Diaz, and Bullcoming. In Nardi, the First Circuit held that lower court's decision, that the autopsy report and the doctor's opinion in partial reliance upon it, did not violation the Confrontation Clause, was not contrary to Crawford. Id. In the context of the defendant's habeas petition, the First Circuit concluded that neither Crawford nor the later cases "clearly established" that autopsy reports are barred as testimonial. Id. ("Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in Melendez-Diaz and Bullcoming, and it is uncertain how the [Supreme] Court would resolve the question...even

[10]This is consistent with Dr. Simms testimony that the police department, as opposed to the medical examiner, is responsible for collected forensic evidence associated with a deceased victim, in cases where a death is suspicious. See TT 2A at 92-93, 100.

now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial."). The First Circuit also found that even if autopsy reports could be classified as testimonial, it is not clear that in-court expert opinion testimony in reliance on such reports would be inadmissible. Id. at 112.

Although the State contends that Defendant's right to confrontation was not violated as a result of Dr. Simms' testimony, this issue not been conclusively decided by the United States Supreme Court or by the Nevada Supreme Court. Additionally, courts are extremely divided on this issue. Compare, e.g., Bannah v. State, 87 So.3d 101, 103 (Fla. Dist. Ct. App. 2012) (autopsy reports are non-testimonial because they are prepared pursuant to statutory duty and not solely for use in prosecution), People v. Cortez, 931 N.E.2d 751 (Ill. App. Ct. 2010) (Melendez–Diaz did not upset prior holdings that autopsy reports are non-testimonial business records that do not implicate Crawford), and People v. Dungo, 286 P.3d 442, 450 (Cal. App. 4th Dist. 2012) ("The autopsy continued to serve several purposes, only one of which was criminal investigation," and "[t]he autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial."), with Commonwealth v. Avila, 912 N.E.2d 1014, 1029 (Mass. 2009) (autopsy report was testimonial hearsay), Cuesta-Rodriguez v. State, 241 P.3d 214 (Okla. Crim. App. 2010) (same), and Wood v. Texas, 299 S.W.3d 200, 209-10 (Tex. Crim. App. 2009) (not all autopsy reports are categorically testimonial, but where the police suspected the death at issue was a homicide, the autopsy report was testimonial).

Furthermore, as Dr. Simms testified as to his own opinion based on the autopsy report and the autopsy photographs, his testimony did not run afoul of the Confrontation Clause. See Williams, 132 S.Ct at 2228 ("[u]nder settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.")

In the wake of conflicting case law, where error is not clear, Defendant fails to demonstrate that his counsel's actions fell below an objective standard of reasonableness. Counsel cannot be deemed deficient for failing to object in the present case, where there is no definitely case law to demonstrate that any such objection would have been sustained.

Moreover, counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Furthermore, even if the admission of Dr. Simms' testimony was in violation of Crawford, Defendant has not established a reasonable probability that but for counsel's error in failing to object, the result of the trial would have been different. Strickland, 466 U.S. at 687, 104 S. Ct. at 2052. As Defendant notes in his Petition, the cause of death was not disputed at trial. See Petition at 13. As such, it is unclear how Dr. Simms' testimony prejudiced Defendant's case. Notably, Defendant fails to allege what portion of Dr. Simms' was prejudicial. Rather, Defendant alleges prejudice on the basis that counsel's failure to object heightened the standard of review on appeal. See Petition at 22-23. As Defendant voluntarily dismissed his direct appeal, Defendant's argument lacks merit. Based on the foregoing, Defendant's claim must be denied.

2. Ms. Paulette's Testimony regarding Mr. Wahl's DNA Report

Defendant alleges that his trial counsel was ineffective for failing to object to Ms. Paulette's testimony as it related to the findings contained in Mr. Wahl's DNA report regarding Marilee Coote's case. See Petition at 23. Defendant argument is without merit.

First, as noted above, the instant case is distinguishable from Melendez-Diaz, and Bullcoming, wherein forensic reports were introduced at trial. Rather, in this case, Ms. Paulette, reviewed the report, testified that she agreed to its findings and was subject to cross-examination. Moreover, Paulette testified to the procedures of the Las Vegas Metropolitan Police Department (LVMPD) forensics laboratory, the same laboratory Wahl worked at when he authored the DNA report, and was subject to cross-examination. See generally 4B 30-68.

Accordingly, defense counsel's performance did not fall below an objective standard of reasonableness in failing to object to Ms. Paulette's testimony on the basis that it violated the Confrontation Clause.

However, to the extent Mr. Wahl's report is testimonial in nature and Ms. Paulette's testimony thereto was improper, Defendant fails to demonstrate that but for counsel's failure to object to Ms. Paulette's testimony, the result of the trial would have been different.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2052. Notably, Ms. Paulette testified to her own independent findings regarding the presence of Defendant's semen on the carpet inside Marilee's apartment. Although Ms. Paulette did not testify that she independently examined the semen sample from Marilee's vaginal swab, she did testify that Defendant's semen was found on section of carpet underneath Marilee's dead body. TT 4A at 53, TT 3B at 16-21, 39-40. As there is no basis for excluding testimony as to the carpet sample, Defendant cannot demonstrate prejudice from the remainder of Ms. Paulette's testimony. Furthermore, Defendant's own DNA expert did not dispute LVMPD's forensic laboratory method of extracting DNA and agreed with the statistical calculations made by Paulette in both Sheila's and Marilee's cases. Reporter's Trans. of Jury Trial, Volume 4-B at 83-85 (Oct. 20, 2008) ("TT 4B").[11]

Notably, the only allegation of prejudice is that counsel's failure to object heightened the standard of review on appeal. See Petition at 25-26. As Defendant voluntarily dismissed his direct appeal, Defendant's argument lacks merit. Accordingly, Defendant's claim must be denied.

B. Defendant's Trial Counsel was not Ineffective for Failing to Object to the State's Alleged Vouching

Defendant alleges that his trial counsel was ineffective for not objecting to the State's improper vouching of George Brass. Defendant's claim is without merit

It is well settled that the prosecution may not "vouch" for a witness' credibility. Browning v. State, 120 Nev. 347, 358, 91 P.3d 39, 48 (2004). "[S]uch vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of the witness's veracity. Id. (internal citation and quotation marks omitted), accord Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002).

In Rowland, the Nevada Supreme Court determined it was prosecutorial misconduct to refer to a witness as a "man of integrity" and "honor." 118 Nev. at 39, 39 P.3d at 119. The Court reasoned that this characterization of the witness's testimony "amount[ed] to an opinion

[11] This transcript was filed on October 21, 2008.

as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence." Id.

Here, Defendant alleges that State "vouched" for Mr. Brass during Detective Vaccaro's testimony. See Petition at 14-15, 29. Defendant does not specify how the testimony elicited from Detective Vaccaro was improper vouching nor is this claim evident from a review of the record. Accordingly, Defendant's claim regarding Detective Vaccaro is a bare and naked allegation insufficient to warrant relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Defendant also contends that the State "vouched" for Mr. Brass during Detective Long's testimony by eliciting testimony that Mr. Brass could have refused to speak with Detective long had he so chose. See Petition at 11, 29. However, Detective Long's testimony is in no way a "personal assurance" by the prosecution of Mr. Brass' credibility and therefore does not constitute vouching.

Finally, Defendant contends that the State "vouched" for Mr. Brass during closing argument by indicating that Mr. Brass had "nothing to hide." See Petition at 30. Here, the State's comment was proper because it was commenting on the evidence presented and inviting the jury to draw such the reasonable inference that's Mr. Brass' testimony was truthful based on the totality of the evidence. This type of argument is proper. See Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows."). Additionally, this argument is consistent with the jury's role of the "lie detector" in criminal cases. See U.S. v. Scheffer, 523 U.S. 303, 313, 118 S.Ct. 1261, 1266 - 67 (1998) ("A fundamental premise of our criminal trial system is that the jury is the lie detector. Determining the weight and credibility of witness testimony... has long been held to be the part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.") (internal citations omitted).

Furthermore, even if counsel was deficient for failing to object to the State's comments, Defendant fails to demonstrate that but for counsel's failure, the result of the trial would have been different. Strickland, 466 U.S. at 687, 104 S. Ct. at 2052.

Specifically, the evidence against Defendant was overwhelming. Dr. Simms testified that an autopsy of Sheila's body showed that she suffered blunt trauma to her head shortly before she died, was manually strangled and violently sexually assaulted. Moreover, Sheila was sexually assaulted very close in time with her death. Therefore, the person who murdered Sheila was likely the person who sexually assaulted her.

Ms. Paulette testified that a mixture of DNA was found on Sheila's body through a vaginal swab and that the Defendant could not be excluded as a source when over 99.99 percent of the population could be excluded. She also testified that George Brass could not be excluded as the other source of the other DNA found on Sheila. While Defendant places great weight on the credibility of Mr. Brass because he testified that his sexual encounter with Sheila was consensual, the evidence presented at trial demonstrated Mr. Brass had an alibi during the time of Sheila's murder. Specifically, the police investigated Brass's alibi and found out that on March 24, 2005, Mr. Brass checked into work at noon; went to lunch at 4 PM; returned to Wal-Mart at 5 PM and finally left work at 7:45 PM on March 24, 2005.[12] TT 3B at 99. There was no indication that anyone changed Brass's time record. Id. at 99-100. Moreover, the Wal-Mart where Brass worked at was located a good distance away from Sheila's apartment with no convenient driving route. TT 4A at 92-93. Accordingly, although the consensual nature of Mr. Brass' contact with Sheila was important to the State's theory, there was corroborating evidence to support his testimony. Based on the foregoing, Defendant's claim must be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests Defendant's Petition for Writ of Habeas Corpus (POST-CONVICTION) be denied as untimely pursuant to NRS 34.726. To the extent this Court is inclined to rule on the merits of Defendant's petition, the State

[12] Sheila's mother Debra spoke with her on the telephone at approximately 1:00 p.m. and returned from the grocery store at approximately 3:00 p.m. Accordingly, Sheila's murder occurred sometime in the interim. See TT 2B at 16-19.

respectfully requests that Defendant's petition be denied as he failed to demonstrate that his counsel's representation fell below an objective standard of reasonableness, and that but for counsel's alleged errors, there is a reasonable probability that the result of the proceedings would have been different.

DATED this 25th day of August, 2014.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #

BY
PAMELA C. WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF SERVICE

I certify that on the 25th day of August, 2014, I e-mailed a copy of the foregoing State's Response And Motion To Dismiss Defendant's Supplemental Petition For Writ Of Habeas Corpus (Post-Conviction), to:

JAMES A. ORONOZ, Esq.
jim@oronozlawyers.com

BY
R. JOHNSON
Secretary for the District Attorney's Office

RO/PCW/rj/M-1

EXHIBIT "4"

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REPLY
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DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN K. FLOWERS,

Petitioner,

vs.

THE STATE OF NEVADA, Renee Baker, in her official capacity as the Warden of Ely State Prison; James Cox, in his official capacity as Director of the Nevada Department of Corrections; and the State of Nevada

Respondents.

CASE NO.: 06C228755
DEPT NO.: XI

REPLY TO STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

HEARING DATE: NOVEMBER 24, 2014
HEARING TIME: 9:00 A.M.

ORONOZ & ERICSSON LLC
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COMES NOW, Petitioner, NORMAN FLOWERS, by and through his attorney of record, JAMES A. ORONOZ, ESQ., of the law firm ORONOZ & ERICSSON LLC, and hereby submits his Reply to State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) in the above entitled matter.

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This Reply is based upon the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and any oral argument the Court may entertain.

Dated this 10th day of November, 2014.

/s/ James A. Oronoz
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

LEGAL ARGUMENT

A. Defendant's petition for writ of habeas corpus should not be dismissed as untimely

Despite the State's repeated attempts to argue that Mr. Flowers' Petition for Writ of Habeas Corpus (Post-Conviction) was untimely, this Court issued an Order on February 26, 2013, allowing Mr. Flowers' untimely Petition to be heard due to a showing of good cause and prejudice. As such, the parties have litigated this issue ad nauseam, and this Court has already decided this issue.[1]

B. Defendant was denied effective assistance of counsel

A defendant prevails on a claim of ineffective assistance of counsel by demonstrating that (1) counsel's performance was deficient to the point where it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant in such a way as to render the result of the trial unreliable. Strickland v. Washington, 466 U.S. 668, 687-688, 697, 104 S.Ct. 2052 (1984), McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009). A reviewing court must also determine whether counsel's strategic decisions satisfied an objective standard of reasonableness. State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006); Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). Further, prejudice occurs when there is a "reasonable probability" that but for counsel's errors, the result of the trial would have been different. Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Additionally, in regard to post-conviction proceedings, all factual allegations in support of an ineffective assistance of counsel claim need only be proven by a preponderance of the evidence. Powell, 122 Nev. at 759.

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[1] The Nevada Supreme Court will defer to the district court's factual findings regarding good cause. State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012).

[2] In the State's Response, the State incorrectly denoted Mr. Flowers as "Appellant" and cited to "AOB, p. 40." However, this is not an appellate brief, nor did Mr. Flowers' supplemental petition contain forty pages.

[3] Examples of testimonial statements include the following: (1) ex parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, or similar pretrial statements

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1. ***Defendant's trial counsel was ineffective for failing to object to the testimony of Dr. Simms and Ms. Paulette***

The Confrontation Clause of the Sixth Amendment mandates that a defendant in a criminal trial have the opportunity to confront the witnesses against him. U.S. Const. Amend. VI, Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359 (2004). Accordingly, the Confrontation Clause precludes any "testimonial" out-of-court statements by a witness unless the witness appears at trial, or if the witness is unavailable, the defendant had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 53-54. See also, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S.Ct. 2527 (2009), Bullcoming v. New Mexico, 131 S.Ct. 2705, 2710 (2011). Further, a testimonial statement "would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." Vega v. State, 126 Nev. Adv. Op. 33, 236 P.3d 632, 637 (2010). Quoting Medina v. State, 122 Nev. 346, 354, 143 P.3d 471, 476 (2006), Flores v. State, 121 Nev. 706, 719, 120 P.3d 1170, 1178-1179 (2005). See also, Crawford, 541 U.S. at 52.

In this case, the State attempts to make a confusing and inaccurate argument regarding testimonial statements. The State asserts that the Confrontation Clause only triggers when out-of-court statements are both "testimonial" and "hearsay." State's Response, at 13. By definition, testimonial statements are "made for the purpose of establishing or proving some fact" and "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial..." Crawford, 541 U.S. at 51-52. See also, Melendez-Diaz, 557 U.S. at 310, Bullcoming, 131 S.Ct. at 2713-2714 ("An analyst's certification prepared in connection with a criminal investigation or prosecution, the Court held, is "testimonial," and therefore within the compass of the Confrontation Clause."). Vega, 236 P.3d at 637. Also, by definition, "hearsay" is an out of court statement offered to prove the truth of the matter asserted. NRS 51.035. Regardless of the State's attempt to disband the application

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of testimonial statements and hearsay, the Confrontation Clause requirements apply to out-of-court statements intended to establish a fact at trial.

As a result, the testimony offered by Dr. Simms and Ms. Paulette at trial violated Mr. Flowers' confrontation rights. These witnesses testified to written statements of other doctors and analysts that were prepared to establish or prove a fact and were offered for the truth of the matter asserted.[2] Further, trial counsel was ineffective for failing to preserve Mr. Flowers' confrontation rights under the Sixth Amendment. This Court must review the potential prejudice for harmless error. Medina v. State, 122 Nev. at 355.

I. ***Dr. Simms testimony regarding Sheila Quarles' autopsy***

The State incorrectly argues that Dr. Knoblock's autopsy report about Ms. Quarles is not testimonial because it is a business record and a "product of an official duty imposed by law, rather than a product of criminal investigation for use at trial." State's Response, 14-15. The State relies upon U.S. v. De La Cruz, 514 F.3d 121 (1st Cir. 2008), to assert that coroners always conduct autopsies during the normal course of business, and as such, autopsies can fall within the business records exception to the hearsay rule. However, the Nevada Supreme Court has not yet ruled on this issue. In Conner v. State, Chief Justice Gibbons wrote a concurring opinion explaining, "The United States Supreme Court has clearly explained that whether a report falls within an exception to the hearsay rule is not determinative of whether the report is testimonial." Conner v. State, 130 Nev. Adv. Op. 49, 63, 327 P.3d 503, 511 (2014) (Gibbons, C.J., concurring) (Ref. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 322-324, 129 S.Ct. 2527 (2009). Furthermore, the United States Supreme Court concluded that a "coroner's inquest" does not have the "special status" like a business record of being admitted into evidence without being subject to an opportunity for confrontation because a coroner could reasonably believe that his findings would be used in a criminal prosecution. Melendez-Diaz, 557 U.S. at 322. Therefore, the State cannot claim that the autopsy report constituted a non-testimonial business

[2] In the State's Response, the State incorrectly denoted Mr. Flowers as "Appellant" and cited to "AOB, p. 40." However, this is not an appellate brief, nor did Mr. Flowers' supplemental petition contain forty pages.

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record because the coroner could reasonably have believed that his report would have evidentiary value in a criminal prosecution.

Although the Nevada Supreme Court has not yet decided this issue, it decided a very similar issue in which it held that a nurse's report constituted a testimonial statement. In Vega v. State, the Nevada Supreme Court determined that a nurse's written report constituted a testimonial statement in a rape case because the nurse's statement would "lead an objective witness to reasonably believe that the statement would be available for use at a later trial." Vega v. State, 126 Nev. Adv. Op. 33., 236 P.3d 632, 637 (2010) (Internal citations omitted).

Additionally, a number of states have used this same logic to determine that autopsy reports constitute testimonial evidence because autopsy reports would lead an objective person reasonably to believe that the reports would be used in a criminal trial. The Crawford court distinctly noted that the "core class" of testimonial statements was not intended to be a comprehensive list or definition of what qualifies as "testimonial," meaning that even statements falling outside of the core class may still be testimonial because they tend to establish or prove some fact. In light of the broad definition of "testimonial" statements, medical and forensic reports, such as autopsy reports, made in conjunction with a criminal investigation qualify as testimonial statements because it is reasonable to believe that the report will be available for later use at trial.[3] Crawford, 541 U.S. at 68. *See also,* U.S. v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012) (Autopsy reports were testimonial statements subject to Confrontation Clause); Malaska v. State, 88 A.3d 805 (Md.Spec.App. 2014) (Autopsy report contained sufficient formalized indicia as to accuracy of testing processes used or results obtained therefrom to be considered testimonial for purposes of state and federal confrontation analysis in homicide prosecution); Com. v. Carr, 986 N.E.2d 380 (Mass. 2013) (Death certificate prepared by examiner who

[3] Examples of testimonial statements include the following: (1) ex parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, or similar pretrial statements that a declarant would reasonably expect to be used for prosecution; (2) extrajudicial statements contained in formal testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances where it is reasonable to believe the statement will be available for later use at trial. Melendez-Diaz, 557 U.S. at 310 (citing Crawford, 541 U.S. at 51-52).

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performed autopsy on victim was testimonial in fact, and thus defendant's confrontation rights were violated by admission at first degree murder trial of the death certificate without testimony of examiner who had prepared it); State v. Navarette, 294 P.3d 435 (N.M. 2013) (Forensic autopsy reports are testimonial); State v. Kennedy, 735 S.E.2d 905 (W.Va. 2012) (For the purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial); State v. Jaramillo, 272 P.3d 682 (N.M. Ct. App. 2011) (Autopsy report was prepared with the purpose of preserving evidence of criminal litigation as it was made with the intention of the medical examiner to establish the cause and manner of death); Martinez v. State, 311 S.W.3d 104 (Tex. Ct. App. 2010) (Autopsy report was testimonial); State v. Davidson, 242 S.W.3d 409 (Mo. Ct. App.2007) (When an autopsy report is prepared for the purposes of criminal prosecution, the report is testimonial).

Accordingly, forensic reports prepared in conjunction with and for the purposes of aiding a police investigation fall squarely within the definition of "testimonial." Bullcoming, 131 S.Ct. at 2717-2718. Thus, a forensic autopsy report made in conjunction with a criminal prosecution functions as a testimonial statement because it is created with the purpose of aiding a police investigation. Bullcoming, 131 S.Ct. at 2713-2714, 2717 (2011); (See also, Crawford, 541 U.S. at 51-52; Melendez-Diaz, 557 U.S. at 310-311, 320-321; Vega, 126 Nev. Adv. Op. 33, 236 P.3d at 637 (2010); Davis v. Washington, 547 U.S. 813, 830, 126 S.Ct. 2266 (2006)).

In this case, the State claims that Dr. Knoblock's report constituted a business record, and as such, the report was properly admitted into evidence under the business records exception to the hearsay rule. However, the United States Supreme Court clearly explained that a "coroner's inquest" is not admissible as evidence under the "special status" afforded to business records created during the normal course of business without becoming subject to the Confrontation Clause requirements because the "coroner's inquest" is comparable to a police record that is prepared for the production of evidence at trial. See Melendez-Diaz, 557 U.S. at 322.

Here, the record shows that Dr. Knoblock conducted the autopsy in the presence of three Las Vegas Metropolitan Police Department employees. Therefore, any objective person would

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reasonably believe that this particular autopsy report would have been an important piece of evidence and would have been prepared for the production of evidence at trial.

Further, the nurse's report in Vega served precisely the same function as the autopsy report in this case. The nurse prepared her report in conjunction with a sexual assault investigation, which is similar to Dr. Knoblock who prepared Sheila Quarles' autopsy report in conjunction with an ongoing homicide investigation. Dr. Knoblock conducted the autopsy in the presence of Las Vegas Metropolitan Police Department investigators and detectives. The presence of the investigators and detectives demonstrates that the autopsy, and subsequent report, were done at the behest of law enforcement based on a presumption that the victim died as a result of criminal activity. As such, Dr. Knoblock's autopsy report was clearly prepared for the purpose of aiding the investigation and criminal prosecution of Mr. Flowers, which makes the report a testimonial statement.

Moreover, the State misunderstands the relationship between the Confrontation Clause and hearsay exceptions. For example, in Melendez-Diaz, the Court explained that business records are admissible at trial because the records' preparation exists for something other than proving a fact at trial. Melendez-Diaz, 557 U.S. at 324. Non-testimonial business records are prepared during part of a normal record-keeping process without any intention of being used in a trial. The records become testimonial when the preparer would reasonably foresee that the records could be used in a criminal prosecution. Thus, the business records exception to the hearsay rule allows admission of records kept during the normal course of business that are not intended to serve any evidentiary purpose in a trial.

In this case, the autopsy report unmistakably constitutes testimonial evidence because Dr. Knoblock prepared the report *in conjunction with* and *in furtherance of* a criminal investigation. Dr. Knoblock conducted Sheila Quarles' autopsy with the knowledge of the ongoing criminal investigation. Therefore, the autopsy report necessarily constituted testimonial evidence, and as such, Mr. Flowers should have had the right to confront Dr. Knoblock as a witness against him.

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Additionally, the State contends that regardless of the confrontation issue, Dr. Simms qualified as an expert to give his own opinion regarding the evidence. However, the State's contention fails because Dr. Simms testified regarding Dr. Knoblock's subjective opinions pertaining to cause and manner of death, rather than confining his testimony only to matters within the scope of his specialized knowledge. To qualify as an expert witness, the expert must meet the following requirements:

> (1) [the expert] must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement). Perez v. State, 129 Nev. Adv. Op. 90, 313 P.3d 862, 866 (2013) (Citing Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (quoting NRS 50.275)).

Accordingly, under Nevada law, Dr. Simms should have been precluded from testifying about Dr. Knoblock's subjective opinions, which were included in the autopsy report, because they were outside the scope of Dr. Simms specialized knowledge. The State claims, "Dr. Simms testified to his own opinion based on the autopsy report..." State's Response, 16. However, the State also admits, "Dr. Simms stated that Dr. Knoblock's opinion as to Sheila's cause of death was drowning with strangulation as a contributing factor." State's Response, 9. Ref. TT 2A 68-69. Even if the autopsy report were not testimonial, Dr. Simms' testimony would not satisfy the requirements for expert testimony because Dr. Simms did not confine his testimony to his own scope of specialized knowledge because he did not perform the autopsy or generate the autopsy report. Thus, Dr. Simms' testimony should have been stricken for failure to meet the standard of expert testimony.

Even if Dr. Simms does qualify as an expert witness, his testimony constitutes impermissible surrogate testimony. In Bullcoming v. New Mexico, the defendant had been convicted of driving while intoxicated. Bullcoming, 131 S.Ct. at 2705, 2709. In Bullcoming, the prosecutors introduced a testimonial forensic report by calling an analyst as a witness who had not performed the testing or created the report in question. Id. at 2710-2711. The Supreme Court held that this sort of surrogate testimony violated the defendant's confrontation rights because

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the surrogate analyst could not convey the subjective nature of the testing and procedures. Id. at 2715.

Like the surrogate testimony in Bullcoming, Dr. Simms' testimony should not have been introduced at trial. Dr. Simms did not perform, and was not present, at Sheila Quarles' autopsy. Dr. Simms testimony consisted of his interpretation of Dr. Knoblock's findings based merely upon his review of the autopsy report. The situation became even more problematic when Dr. Simms attempted to convey Dr. Knoblock's subjective opinions regarding cause and manner of death at trial. TT 2A 68-69. Thus, the State violated Mr. Flowers' confrontation rights because he was unable to confront Dr. Knoblock about his performance of the autopsy, the opinions he derived from the autopsy, and the contents of his report. As such, Dr. Knoblock's findings contained in the autopsy report of Sheila Quarles should have been precluded due to a clear violation of Mr. Flowers right to confront the State's witnesses.

Considering the fact that Dr. Knoblock's autopsy report of Sheila Quarles should have been subject to the Confrontation clause requirements, Mr. Flowers' trial counsel was ineffective for failing to object to the State's introduction of the autopsy report through Dr. Simms as a surrogate witness. Dr. Knoblock's autopsy report indicated homicide as the method of death, which is the entire crux of the State's case, and as such, the basis of that determination should have been subject to confrontation.

The State also fails to recognize how Dr. Simms' testimony prejudiced Mr. Flowers. State's Response, at 17. The State notes, "As such, it is unclear how Dr. Simms' testimony prejudiced Defendant's case. Notably, Defendant fails to allege what portion of Dr. Simms' was prejudicial." State's Response, at 17, ln. 7-9. In light of the fact that Dr. Knoblock's autopsy report was heavily testimonial given the circumstances of this case, Mr. Flowers contends that the entirety of Dr. Simms' surrogate testimony violated his confrontation rights and served no legitimate purpose other than to bolster Dr. Knoblock's determination of homicide. Aside from the obvious constitutional violations, Dr. Simms discussed subjective opinions contained in the autopsy report. TT 2A 68-69. This caused irreparable prejudice because the jury heard Dr. Knoblock's subjective opinions, which were not subjected to cross-examination. This is

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precisely the kind of testimony that the Confrontation Clause seeks to prohibit. Thus, Mr. Flowers' trial counsel should have objected to this surrogate testimony in an effort to protect Mr. Flowers' confrontation rights.

Mr. Flowers' trial counsel's failure to object to Dr. Simms' testimony fell below an objective standard of performance by failing to protect Mr. Flower's constitutional right to confront one of the State's critical witnesses. This failure prejudiced Mr. Flowers to such an extent that the result of the trial would have been different. At a minimum, had trial counsel raised an objection, the trial court could have addressed Dr. Knoblock's availability and precluded Dr. Simms from acting as a surrogate witness and bolstering the subjective opinions contained in the autopsy report. Clearly, had the trial court precluded Dr. Simms from testifying regarding the cause and manner of death, the State could not have met their burden of proving all the elements of the alleged offenses beyond a reasonable doubt. Further, the objection would have preserved Mr. Flowers' appellate right to address Dr. Simms' testimony on direct appeal. Thus, trial counsel's failure to object caused Mr. Flowers to suffer irreparable prejudice.

ii. ***Ms. Paulette's testimony regarding Mr. Wahl's DNA report***

Trial counsel was ineffective for failing to object to Ms. Paulette's surrogate testimony regarding the opinions in Mr. Wahl's DNA report prepared for the Marilee Coote matter, a completely separate case.

At trial, Ms. Paulette testified regarding the contents of her own forensic DNA report for the Sheila Quarles homicide. Additionally, the State asked Ms. Paulette to testify to the contents of Mr. Wahl's DNA report for the Marilee Coote case—a completely separate and unrelated case in which Mr. Flowers had been involved. The judge in the Sheila Quarles case allowed evidence of the Marilee Coote case to show similarities and motive. Although Ms. Paulette testified to the contents of her own report for the Sheila Quarles case, Ms. Paulette became a surrogate witness for the contents of Mr. Wahl's report written for the Marilee Coote case.

Here, the State claims that Mr. Wahl's DNA report regarding the Marilee Coote case is somehow distinguishable from the forensic reports identified in Melendez-Diaz and Bullcoming. This contention fails. Mr. Wahl's DNA report in the Coote case was created during the course of

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a police investigation into a homicide. Certainly, Mr. Wahl created the DNA report for an "evidentiary purpose." Bullcoming, 131 S.Ct. at 2717, Crawford, 541 U.S. at 53-54, Melendez-Diaz, 557 U.S. at 311.

Additionally, the State fails to distinguish between Ms. Paulette's testimony regarding the contents of the Mr. Wahl's report in the Coote case and her testimony regarding her own report in the Quarles case. State's Response, at 17. During the trial, the State examined Ms. Paulette as a witness for two different evidentiary functions. First, Ms. Paulette testified to her own DNA analysis performed for Sheila Quarles' case and regarding the procedures in the LVMPD forensic laboratory. Since Ms. Paulette prepared this report, she could testify to contents and opinions of this report.[4] However, the State also offered Ms. Paulette as a witness to Dr. Wahl's DNA analysis and opinions regarding the Coote case, for which Mr. Flowers was not on trial. This second function clearly triggers the Confrontation Clause restraints because Ms. Paulette was not the analyst who prepared that report, nor did she have specialized knowledge regarding the conclusions contained in Mr. Wahl's report. Therefore, her testimony should not have been admitted because Mr. Flowers never had the opportunity to cross-examine Mr. Wahl.

Further, Ms. Paulette's testimony regarding Mr. Wahl's report caused Mr. Flowers to suffer irreparable prejudice because the DNA analysis linked Mr. Flowers to a murder for which he was not on trial. Accordingly, the jury heard about forensic evidence linking Mr. Flowers to a crime, and Mr. Flowers did not have the opportunity to cross-examine the analyst who created the testimonial report. Although Ms. Paulette's opinions regarding Mr. Wahl's report related to the Coote case, it is highly unlikely that the jury could distinguish the nature of the evidence and properly use Mr. Wahl's report for anything other than "a declaration or affirmation made for the purpose of establishing or proving some fact." Bullcoming, 131 S.Ct. at 2717. The simple

[4]In its response, the State seems to confuse the argument in Mr. Flowers' supplemental petition. Mr. Flowers did not make an ineffective assistance claim regarding Ms. Paulette's testimony regarding her own findings. Mr. Flowers claims that counsel's failure to object to Ms. Paulette's testimony regarding the contents of Mr. Wahl's report constituted ineffective assistance of counsel because Mr. Flowers should have had the opportunity to cross-examine Mr. Wahl as a witness against him or Mr. Wahl's report should not have been admitted into evidence.

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fact in this case is that a homicide occurred, and the State impermissibly used Ms. Paulette's testimony about Mr. Wahl's analysis to link Mr. Flowers to the Sheila Quarles homicide, despite the fact that Mr. Wahl's analysis pertained to a different homicide altogether. This opened the door for the jury to draw impermissible inferences regarding Mr. Flower's guilt.

As such, trial counsel's failure to object to Ms. Paulette's surrogate testimony fell below an objective standard of reasonableness. This situation prejudiced Mr. Flowers to the extent that the outcome of the trial would have been different. Had the court sustained an objection, the State would have been forced to subject Mr. Wahl to cross examination, whereby the defense could have challenged a very powerful piece of evidence used to show Mr. Flower's motive for the Sheila Quarles murder. In the alternative, if the State could not produce Mr. Wahl for trial, Ms. Paulette's testimony pertaining to Mr. Wahl's report would have been precluded, and the State would have had significantly less support to prove the allegations against Mr. Flowers beyond a reasonable doubt.

2. ***Defendant's trial counsel was ineffective for failing to object to the State's vouching***

The State used the prestige of the government to vouch for George Brass' credibility, despite the fact that Mr. Brass had sex with Sheila Quarles on the day of her murder, which should have effectively made Mr. Brass an alternative suspect in this case. During the trial, the State elicited testimony from Detective Vaccaro and Detective Long that constituted vouching for Mr. Brass' credibility. Additionally, during closing arguments, the State explicitly vouched for Mr. Brass' credibility by drawing a comparison between Mr. Brass' admission that he had sex with Sheila Quarles the day she died, and Mr. Flowers' election to exercise his Fifth Amendment right to remain silent. Thus, during its closing argument, the State persistently described Mr. Brass as a trustworthy individual, thereby vouching for his credibility.

It is established that a prosecutor may not vouch for the credibility of its own witness. Browning v. State, 120 Nev. 347, 358-359, 91 P.3d 39, 48 (2004); Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Further, a prosecutor vouches by placing the "prestige of the government behind the witness" and provides "personal assurances of [the] witness's veracity." Browning, 120 Nev. at 359; Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114 (2002).

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As the State noted, in Rowland, the Nevada Supreme Court held that describing an inmate witness as a "man of integrity" and "honor" constituted prosecutorial misconduct. Rowland, 118 Nev. at 39. However, the State clearly neglected the remainder of the Rowland opinion. In Rowland, the Court reasoned, "even asserting that the defendant is lying is equally impermissible." Id. See also, Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153 (1988) ("The characterization of testimony as a lie is improper argument.").

Nevada has adopted the Ninth Circuit's logic regarding prosecutorial vouching, "Analysis of the harm caused by vouching depends in part on the closeness of the case." Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997); (citing U.S. v. Frederick, 78 F.3d 1370, 1378 (9th Cir.1996); Ref. U.S. v. Roberts, 618 F.2d 530, 534 (1980). Further, "If the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." Rowland, 118 Nev. at 38. As a result, if the question regarding innocence or guilt is close, then the reviewing courts will be more likely to reverse the case based upon prejudicial vouching. Nevada has adopted a two-pronged analysis to determine the propriety of a prosecutor's conduct: (1) determine "whether the prosecutor's conduct was improper," and (2) determine "whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

In this case, the State incorrectly claims that Mr. Flowers did not explain how the State's elicited testimony from Detective Vaccaro constituted improper vouching. Mr. Flowers explained the following:

> In addition, during the direct examination of Detective James Vaccaro, the prosecutor vouched to the jury that Mr. Brass should not have been considered a prime suspect to the murder and sexual assault. Detective Vaccaro retired in 2007, but Mr. Brass did not admit to having sex with the victim until a detective approached him in 2008. Accordingly, Detective Vaccaro did not have any personal knowledge regarding Mr. Brass's admission because Detective Vaccaro had already retired at the time of Mr. Brass's admission. Therefore, the prosecutor used the prestige of the government when it used Detective Vaccaro's position as a representative of law enforcement to make Mr. Brass's story more believable.

Supplemental Petition, at 29.

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Further, in the Statement of Facts of the Supplemental Petition, Mr. Flowers provided the direct portion of Detective Vaccaro's testimony in which the State elicited responses to vouch for Mr. Brass:

> During direct examination, the State elicited improper vouching testimony from Detective Vaccaro regarding the State's essential witness, George Brass, Jr.:
>
> Q- "Now, if Mr. Brass—or assuming Mr. Brass admitted or told detectives that he had sexual contact with Miss Quarles on the day of her death, the room or the location that the intercourse took place wouldn't be particularly relevant in the investigation, would it, if it was a consensual relationship?"
>
> A- "Not with regard to that sexual contact with regard to Mr. Brass."
>
> Q- "Okay. So if he said that he had sex with her on the floor of one of the rooms in Debra Quarles' apartment, knowing that doesn't necessarily tell you who killed Sheila Quarles later on?"
>
> A- "I think that the correct answer to that would be that it wasn't important until we knew more about that sexual activity and whether or not he was a suspect in our case. So I don't know if that's a confusing answer, but when we learned about him as a suspect or not a suspect in our case, when he did not develop as a suspect in our case, then that location that the consensual sex took place wasn't of any importance to us."
>
> Q- "I mean—yeah, I guess that's my question." It doesn't tell you any more about the investigation or how she was killed if he says I had sex with her on the living room floor, on the kitchen floor or on the bedroom floor? That doesn't tell you anything about who killed Sheila Quarles, does it?"
>
> A- "No. I mean, he could have said he had sex with her at a location other than the apartment even, for that matter. The fact that he said that he had sexual contact with her, but then showed additional information—or additional investigation showed us that he wasn't a suspect in that, where they had sex wasn't of importance to us; and, at that point, I think that was beyond my time there anyway. So in my experience, that wouldn't have been important to me."
>
> Q- "And the fact that someone has sex with another individual on a floor or on a carpet, that wouldn't necessarily mean that sperm or some kind of DNA would end up on the carpet by virtue of the sexual activity, would it?"
>
> A- "No. But I guess we could say that depending upon the positioning of the two individuals having sex, you could make a conclusion whether or not there was some deposit of semen on the surface that they were having sex on. So I don't really know how to answer that."
>
> Q- "Maybe, maybe not?"
>
> A- "It doesn't mean it's always going to be there."
>
> TT Vol. 2B at 130-131.

Supplemental Petition, at 14-15.

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Detective Vaccaro had no personal knowledge of Mr. Brass' admission that he had sex with Sheila Quarles on the day she died. Detective Vaccaro testified that he retired in 2007. TT Vol. 2B at 114. In August of 2008, Mr. Brass admitted to having sex with Sheila Quarles on the day she died. TT Vol. 2B at 113-114. As such, Detective Vaccaro could not have personal knowledge regarding Mr. Brass' affairs because he was no longer working as a detective at the time of Mr. Brass' admission. TT Vol. 2B at 114.

Despite the fact that Detective Vaccaro did not have personal knowledge regarding Mr. Brass' admission, the State asked Detective Vaccaro to make assumptions about the situation and develop incorrect conclusions based upon those assumptions. Detective Vaccaro admitted to lacking personal knowledge of Mr. Brass' admission and to having heard about the admission on a second-hand basis. TT Vol. 2B at 114, 130-131. Knowing that Detective Vaccaro did not have personal knowledge about Mr. Brass' admission, the State repeatedly asked Detective Vaccaro questions to ensure that Mr. Brass' admission would not make Mr. Brass a suspect in the criminal investigation. TT Vol. 2B at 130-131. See Supplemental Petition, at 14-15. The State's questioning lead Detective Vaccaro to vouch for the police officers' decision not to investigate Mr. Brass as a potential suspect in Sheila Quarles' homicide. Logically, Detective Vaccaro would answer the State's questions in a manner that supported the other officers' decision to exclude Mr. Brass as a suspect and failure to inquire further into his admission. Thus, the State used Detective Vaccaro to vouch for the credibility of the other officers' failure to question Mr. Brass as a potential subject to Sheila Quarles' murder. In turn, the State used this questioning as a mechanism to take suspicion away from Mr. Brass and to convey Mr. Brass as a credible individual in order to convict Mr. Flowers despite the closeness of the case.

As a result of the prosecutor's line of questioning, the State created a situation in which Mr. Flowers suffered prejudice. This is a very close case because the victim had sex with two men on the day she died. However, the police and the prosecutors only chose to investigate one potential suspect, despite the fact that in 2008, Mr. Brass explicitly disclosed the fact that he slept with Sheila Quarles on the day she died. The prosecutors knew that Detective Vaccaro had retired in 2008 when Mr. Brass provided this admission, and the prosecutors questioned

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Detective Vaccaro about Mr. Brass despite Detective Vaccaro's lack of personal knowledge about the situation. This line of questioning certainly constitutes improper vouching.

Additionally, the State cannot argue that it did not elicit any "personal assurances" when questioning Detective Long about Mr. Brass' willingness to discuss Sheila Quarles. For example, the State repeatedly questioned Detective Long about Mr. Brass' voluntary conversation about Sheila Quarles. Supplemental Petition, at 11-12, 29-30. TT Vol. 3B at 41-43, 66-68. The State used Detective Long's explanation as to why Mr. Brass was not a suspect to build Mr. Brass' credibility. Detective Long, as a law enforcement agent, holds a public position and represents the prestige of the government. Therefore, by demonstrating that Detective Long supported the decision to exclude Mr. Brass as a suspect, the State used Detective Long as a representative of government prestige to support the contention that Mr. Brass was credible because he voluntarily spoke with Detective Long.

The State impermissibly drew a comparison between Mr. Flowers exercising his right to remain silent and Mr. Brass' willingness to talk. The State explicitly used Detective Long's testimony to show that Mr. Brass spoke to Detective Long, despite the fact that he could have refused to discuss Sheila Quarles. This sent a powerful message to the jury that the State believed Mr. Brass was more credible than Mr. Flowers because Mr. Brass' willingness to talk to the police precluded his viability as a suspect to Sheila Quarles' death. Thus, a lay jury would be more likely to believe the prosecutor's logic as to which man could have committed the murder. However, based on the scientific evidence presented, a reasonable jury could not have determined which man had sex with Sheila Quarles first on the day she died, which demonstrates the closeness of this case. Therefore, the prosecutor impermissibly vouched for Mr. Brass' credibility in juxtaposition to Mr. Flowers' exercise of his right to remain silent, when in fact, Mr. Brass was a legitimate suspect in Sheila Quarles' death.

Further, the State incorrectly contends that labeling Mr. Brass as having "nothing to hide" simply invited the jury "to draw such the reasonable inference that's [sic] Mr. Brass' testimony was truthful based on the totality of the evidence" during the closing arguments. State's Response, at 19. The State's contentions fail. The State continuously told the jury that

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Mr. Brass could not be the killer because Mr. Brass voluntarily discussed his relationship with Sheila Quarles with detectives. Supplemental Petition, at 15-16. TT Vol. 5 at 118. Additionally, the State explained that Mr. Brass did not evade the police and displayed a cooperative demeanor. Id. TT Vol. 5 at 118-120. Further, the State drew conclusions that the evidence absolutely vilified Mr. Flowers because Mr. Flowers did not voluntarily speak with law enforcement. Id. By comparing Mr. Brass' willingness to testify against Mr. Flowers' choice to exercise his right to remain silent, the prosecutor's statements infected the proceedings with unfounded conclusions regarding Mr. Flowers' culpability. As such, the prosecutors' vouching was improper because it bolstered the credibility of a state witness to improve the likelihood of convicting Mr. Flowers. This was a close case, as shown by the DNA evidence. Thus, the prosecutors seized the opportunity to highlight Mr. Flower's refusal to speak to the police in an effort to convince the jury that Mr. Flowers was guilty because he elected to remain silent rather than cooperate with the police.

The State argues that it was simply providing the facts to the jury in a manner such that the jury could function as the lie detector and determine the credibility of the witnesses. State's Response, at 19. This argument is inapplicable to this case. The State presented improper conclusions, which allowed the jury to heed to emotional prompts and attribute credibility to Mr. Brass, when in fact, Mr. Brass did not merit that credibility. The State's comparison of Mr. Brass' admission with Mr. Flowers' silence provided the jury with an opportunity to attribute unwarranted credibility to Mr. Brass and to ignore him as an alternate suspect.

As previously stated, the facts presented to the jury made this a very close case. Mr. Flowers and Mr. Brass each had sex with Sheila Quarles on the day she died. Thus, the State impermissibly resorted to vouching in order to give them an unwarranted advantage in convicting Mr. Flowers because the State did not have concrete facts upon which to convict Mr. Flowers.

Accordingly, trial counsel's deficiency stemmed from the failure to object to the State's impermissible vouching, which irrevocably prejudiced Mr. Flowers' right to a fair trial. Had trial counsel objected to the State's vouching, the result of the trial would have been different

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because the jury would have seen Mr. Brass as an alternate suspect rather than a credible witness. Given the closeness of the case, the State's vouching, which constituted prosecutorial misconduct, cannot be considered harmless. Thus, had the court sustained an objection to the State's vouching, the outcome of the case would have been different.

II.

CONCLUSION

For the reasons stated above, Norman Flowers' conviction is unconstitutional under the federal and state constitutions for each of the reasons stated herein. Mr. Flowers' judgment of conviction must therefore be vacated.

DATED this 10th day of November, 2014.

/s/ James A. Oronoz
JAMES A. ORONOZ, ESQ.
ORONOZ & ERICSSON LLC
700 South Third Street
Las Vegas, Nevada 89101
Telephone: (702) 878-2889
Facsimile: (702) 522-1542
Attorney for Petitioner, Norman Flowers

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2014, I served a true and correct copy of the foregoing Reply to State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on the following:

STEVEN WOLFSON, Clark County District Attorney
PAMELA C. WECKERLY, Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
pdmotions@clarkcountyda.com

I further certify that on the 10th day of November, 2014, I deposited in the United States Post Office at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the foregoing Reply to State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), addressed to the following:

RENEE BAKER
Warden
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

CATHERINE CORTEZ MASTO
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4714

/s/ Rachael Stewart
An employee of Ormoz & Ericsson LLC

ORMOZ & ERICSSON LLC
700 South Third Street • Las Vegas, Nevada 89101
Telephone (702) 575-2889 Facsimile (702) 522-1542

EXHIBIT "5"

Electronically Filed
05/28/2015 07:22:05 AM

CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHRISTOPHER BURTON
Deputy District Attorney
Nevada Bar #012940
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
NORMAN KEITH FLOWERS,
aka Norman Harold Flowers III, #1179383
Defendant.

CASE NO: 06C228755
DEPT NO: XI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: APRIL 29, 2015
TIME OF HEARING: 9:00 AM

THIS CAUSE having come on for hearing before the Honorable JUDGE ELIZABETH GONZALEZ, District Judge, on the 29th day of April, 2015, the Petitioner not being present, REPRESENTED BY LUCAS GAFFNEY, Esq., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through LISA LUZAICH, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On December 13, 2006, a Grand Jury issued an Indictment on Norman Keith Flowers, aka Norman Harold Flowers III (hereinafter "Flowers") for the following: COUNT 1 – Burglary (Felony – NRS 205.060); COUNT 2 – Murder (Felony 200.010, 200.030); COUNT

3 – Sexual Assault (Felony – NRS 200.364, 200.366) and COUNT 4 – Robbery (Felony – NRS 200.380). The victim named in the Indictment was Sheila Quarles.

On December 26, 2006, the State filed a Motion to Consolidate seeking to consolidate this case with District Court Case Number C216032. The motion was also filed in Case Number C216032. In Case Number C216032, Flowers was charged with two counts of murder (and other charges) for the deaths of Marilee Coote and Rena Gonzales. Flowers filed an Opposition on January 2, 2007. On January 8, 2007, District Court Judge Joseph Bonaventure, sitting judge for Case Number C216032, denied the State's motion. On January 11, 2007, the State filed a Notice of Intent to Seek Death Penalty in this matter.

On January 23, 2007, Flowers filed a Motion in Limine to Preclude Evidence of Other Bad Acts and Motion to Confirm Counsel. In his motion, Flowers sought to keep out evidence of the Gonzales and Coote murders and to confirm attorney Brett Whipple, Esq., as his counsel. The State filed an opposition on February 2, 2007. On February 5, 2007, the Court denied Flowers' motion to confirm counsel but did not address the prior bad acts. On November 5, 2007, the State filed a Motion for Clarification of Court's Ruling seeking to clarify if they could introduce evidence of the murders charged in Case Number C216032 at trial in this matter. Flowers filed an opposition on November 6, 2007. On November 15, 2007, the Court ordered a Petrocelli hearing on the bad acts that the State wanted to introduce at trial. On August 1, 2008, the Court found that the murder and sexual assault of Coote had a sufficiently similar nexus to the Sheila Quarles murder and could be used at trial, but denied the admission of evidence of the Rena Gonzales murder.

An Amended Indictment was filed on October 15, 2008, alleging the same charges as set forth in the Indictment. On October 22, 2008, pursuant to a jury verdict, Flowers was found guilty of COUNTS 1, 2 & 3, i.e., Burglary; First-Degree Murder and Sexual Assault, respectively. Flowers was found not guilty of COUNT 4 – Robbery. On October 24, 2008, following a penalty hearing, the jury imposed a sentence of LIFE Without the Possibility of Parole for COUNT 2. On October 30, 2008, Flowers filed a Motion for New Trial alleging

insufficient evidence. On November 10, 2008, the State filed an Opposition. The Court denied Flowers' motion on November 12, 2008.

On January 13, 2009, Flowers was sentenced as follows: as to COUNT 1 – to a maximum of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC) with a minimum parole eligibility of FORTY-EIGHT (48) MONTHS; as to COUNT 2, to LIFE Without the Possibility Of Parole, to run consecutive to COUNT 1; as to COUNT 3, to LIFE With the Possibility Of Parole after ONE HUNDRED TWENTY (120) MONTHS, to run consecutive to COUNT 2. The Judgment of Conviction was filed on January 16, 2009, erroneously noting as to COUNT 3, a sentence of LIFE Without the Possibility of Parole, with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS. On January 29, 2009, Flowers appeared in court with counsel pursuant to the State's request for clarification of the sentence. An Amended Judgment of Conviction was filed February 12, 2012 to reflect the true sentence of LIFE *With* the Possibility Of Parole with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS for COUNT 3.

On January 26, 2009, Flowers filed a Notice of Appeal from the Judgment of Conviction. On February 20, 2009, Flowers filed an Amended Notice of Appeal.

On March 5, 2010, Flowers filed a Motion for New Trial Based upon Newly Available Evidence. The Court denied the Motion for New Trial. On April 1, 2010, Flowers filed a Notice of Appeal from the Court's denial of his Motion for New Trial.

On June 10, 2011, pursuant to negotiations, Flowers entered an Alford plea to an Amended Indictment in Case Number C216032, which charged Flowers with two (2) counts of First-Degree Murder for the deaths of Marilee Coote and Rena Gonzales. Pursuant to the plea negotiations, Flowers agreed to withdraw his appeals in this case which were pending before the Nevada Supreme Court; i.e., Flowers v. State, Docket # 53159 (Appeal from the Judgment of Conviction); and Flowers v. State, Docket # 55759 (Appeal from the District Court's order denying Flowers' motion for new trial). On June 13, 2011, Flowers filed a Motion to Voluntarily Dismiss his Appeal in each of these cases. On September 28, 2011, the Supreme Court issued an Order Dismissing Appeals in Docket # 53159 and Docket # 55759.

On May 16, 2012, Flowers filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing, seeking the appointment of counsel in the preparation of a post-conviction petition for writ of habeas corpus. On May 30, 2012, the court granted Flowers' motion. On June 8, 2012, James A. Oronoz, Esq., was appointed as post-conviction counsel.

At a status check on July 13, 2012, defense counsel advised the Court he still had not obtained Flowers' file. On August 27, 2012, defense counsel advised the Court he was still not in possession of Flowers' file. Counsel presented the Court with an Order which was signed in open court, ordering the District Attorney's Office to provide Flowers with a copy of discovery.

On September 10, 2012, before the time to file the post-conviction petition expired in this case, the parties appeared in court at the State's request for a clarification of the August 27, 2012 discovery order. Defense counsel made an oral motion to extend the timeline for the filing of Flowers' post-conviction petition. The Court granted defense counsel's request and extended the deadline by 30 days. The Court also noted that when it signed the discovery order on August 27, 2012, it had not realized there would be an objection by the State to providing discovery. Accordingly, the Court vacated the discovery order signed on August 27, 2012, and ordered briefing on the matter.

On October 9, 2012, Flowers filed a Petition for Writ of Habeas Corpus (Post-Conviction). On October 30, 2012, the State moved to dismiss Flowers' petition as untimely. On October 31, 2012, Flowers filed a Motion to Place on Calendar to Supplement Defendant's Petition for Writ of Habeas Corpus. On November 2, 2012, State filed an opposition to Defendant's Motion to Place on Calendar. On November 23, 2012, Flowers filed a reply to State's opposition.

On September 12, 2012, prior to the filing of Flowers' petition, Flowers filed a Motion to Obtain a Complete Copy of Discovery from the State. On December 14, 2012, the State filed an opposition. On January 16, 2013, the Court heard argument on Flowers' discovery motion. The next day, the district court issued a minute order. The Court found: 1) NRS 34.726 does not address instances where a pending appeal is dismissed and no remittitur is

issued from the Nevada Supreme Court; 2) even assuming NRS 34.726 applied, there was good cause to overcome the procedural bar because post-conviction counsel had been "unable to obtain a copy of his file for reasons outside of his control;" 3) the Court's September 17, 2012 Order granting an extension created prejudice; and 4) Flowers' filing of the petition within eleven days of the deadline was reasonable. The minute order noted that the discovery issue would be addressed at the next scheduled hearing on March 6, 2013. The instant case was reassigned to Department 11 on January 22, 2013.

On March 5, 2013, the State filed a Renewed Response and Motion to Dismiss Flowers' Petition for Writ of Habeas Corpus (Post-Conviction). On March 20, 2013, the Court ordered supplemental briefing as to Flowers' post-conviction petition. Following a stipulation by the parties to extend the briefing schedule, Flowers filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on July 7, 2014. On August 25, 2015, the State filed a Response and Motion to Dismiss Flower's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). Flowers filed a reply on November 10, 2014.

To prevail on a claim of ineffective assistance of trial counsel a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 104 S. Ct. at 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a

reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton, 115 Nev. at 403, 990 P.2d at 1268 (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2052).

This Court finds that trial counsel was not ineffective for not objecting to the State's evidence regarding George Brass, as such did not constitute vouching. It is well settled that the prosecution may not "vouch" for a witness' credibility. Browning v. State, 120 Nev. 347, 358, 91 P.3d 39, 48 (2004). "[S]uch vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of the witness's veracity. Id. (internal citation and quotation marks omitted), accord Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). Flowers alleged that the State vouched for Mr. Brass during Detective Vaccaro's testimony, but does not specify how the testimony elicited from Detective Vaccaro was improper vouching. Flowers also alleged that the State vouched for Mr. Brass during Detective Long's testimony by eliciting testimony that Mr. Brass could have refused to speak with Detective Long had he so chose. The Court finds this is not a "personal assurance" by the prosecution of Mr. Brass' credibility, and therefore no improper vouching occurred.

Flowers also contends that the State "vouched" for Mr. Brass during closing argument by indicating that Mr. Brass had "nothing to hide." This Court finds that the circumstances as presented do not indicate vouching. The State's comment was proper because it was commenting on the evidence presented and inviting the jury to draw a reasonable inference that Mr. Brass' testimony was truthful based on the totality of the evidence. This type of argument is proper. See Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows."). Flowers has not shown deficiency or prejudice, thus this claim is denied.

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This Court finds that trial counsel was not ineffective for not objecting to Dr. Simms testimony as it related to the findings contained in Dr. Knoblock's autopsy report. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S.Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). Thus, testimonial hearsay - i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony - may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S.Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 51-52, 60 n.9, 124 S.Ct. at 1369 n.9 (citing, Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 2081-82 (1985)).

This Court finds that no Confrontation Clause violation was committed during Dr. Simms' testimony as the autopsy report is not testimonial in nature. Autopsy reports are the product of an official duty imposed by law, rather than a product of criminal investigation for use at trial. See NRS 259.050. Unlike the reports held testimonial in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), and Bullcoming v. New Mexico, 564 U.S. ___, 131 S.Ct. 2705 (2011), autopsy reports are generated regardless of any request by law enforcement and are not produced solely or even primarily for purposes of gathering evidence for a future criminal prosecution. See Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 2221, 2251 (2012) (Breyer, J. concurring) ("Autopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial").

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This Court finds that as Dr. Simms testified as to his own opinion based on the autopsy report and the autopsy photographs, his testimony did not run afoul of the Confrontation Clause. See Williams, 132 S.Ct. at 2228. ("Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.") Thus, any objection by trial counsel would have been futile, and counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Flowers has not established deficiency, therefore this claim is denied.

This Court finds that trial counsel was not ineffective for failing to object to Ms. Paulette's testimony as it related to the findings contained in Mr. Wahl's DNA report regarding Marilee Coote's case, as there was no Confrontation Clause violation. Paulette reviewed the report, testified that she agreed to its findings, and was subject to cross-examination. Moreover, Paulette testified to the procedures of the Las Vegas Metropolitan Police Department (LVMPD) forensics laboratory, the same laboratory Wahl worked at when he authored the DNA report, and was subject to cross-examination.

This Court has reviewed the other claims asserted by Flowers in his Petitions and finds them to be without merit.

This Court finds that as the record clearly belies Flowers' claims, an evidentiary hearing is not required.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 11th day of May, 2015.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY
CHRISTOPHER BURTON
Deputy District Attorney
Nevada Bar #012940

CERTIFICATE OF SERVICE

I certify that on the 20th day of May, 2015, I e-mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

LUCAS GAFFNEY, Esq.,
luke@oronozlawyers.com

BY
R. JOHNSON
Secretary for the District Attorney's Office

GC/CB/rj/M-1

EXHIBIT "6"

TRAN

FILED

OCT 4 10 47 AM '11

CLERK OF THE COURT

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

NORMAN KEITH FLOWERS aka,
NORMAN HAROLD FLOWERS,

Defendant.

CASE#: C216032

DEPT. VIII

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE

WEDNESDAY, JULY 27, 2011

TRANSCRIPT OF PROCEEDINGS
SENTENCING COUNTS 1 & 2
PLEA
STATUS CHECK: HEARING
DEFENDANT'S PRO PER MOTION TO WITHDRAW PLEA

APPEARANCES:

For the State: PAM WECKERLY, ESQ.
Chief Deputy District Attorney
ELISSA LUZAICH, ESQ.
Chief Deputy District Attorney

For the Defendant: JAMES A. ORONOZ, ESQ.
Deputy Public Defender

RECORDED BY: JILL JACOBY, COURT RECORDER

Q Strongly told him no?

A Strongly told him no.

Q Okay. And did we also talk about the withdrawal of his appeal?

A You did. We did.

Q Okay. So all of this was talked about between the Defendant and the State in your presence, correct?

A Yes, it was.

Q Were we able to reach a deal when we were there?

A No.

Q Did we leave?

A Yes, you did.

Q After we left did you and Mr. Schieck still remain behind and speak to the Defendant?

A Yes, we did.

Q And did you speak to him for a period of time?

A Yeah, it was I guess approximately a half an hour or so.

Q Okay. You weren't rushed? You were able to answer any questions he had?

A Yes. We were not rushed.

Q When you came back to Las Vegas afterwards, did you have any further conversation or email or anything of that nature with the State that day?

A Yes. Before Mr. Schieck and I left High Desert, we had come to an understanding with Norman regarding a deal that he would take and that deal was on the Coote homicide, that he would plead guilty via the *Alford* plea and accept a sentence of life without the possibility of parole and that would be consecutive to the

one that he was serving. And then on the Gonzales matter he would plead guilty again, via *Alford* and would receive a sentence of life with the possibility of parole and that would be concurrent to the Coote.

It also included, as we stated, waiving his direct appeal on the Quarrels case and that the State would make some efforts or would at least talk to the gentleman in the Inspector General's office and ask him that Mr. Flowers be placed in Lovelock.

Q So still on that date did we respond to you and indicate that we would not accept an *Alford* plea regarding Coote but the rest of the negotiation we could live with?

A That is correct.

Q So when we came the next day to calendar call was there a negotiation?

A Not immediately because of the non -- of you refusing the *Alford* plea in the Gonzales matter. I talked to Mr. Flowers and he was very adamant that should he -- if he was going to plead guilty that it would have to be Alford on both and I conveyed that to you and Miss Weckerly and you considered it and then agreed he could plead *Alford* to both counts.

Q Okay. So, originally, we had said no to the *Alford* on one but the *Alford* on the other was okay, correct?

A Correct.

Q And then we had further conversation with you after you spoke with the Defendant and then we agree to *Alford* on both counts, is that correct?

A Correct.

Q When we came to court that morning -- and that was Friday before trial

EXHIBIT "7"

From: [redacted]
To: [redacted]
Subject: Norman Flowers
Date: Monday, June 15, 2015 2:33:46 PM

Karen,
Shortly after Mr. Flowers entered his plea, pursuant to his request I called to ask that he be housed at Lovelock. I spoke to 2 different people, both of whom told me something to the effect of thanks for your request, we'll place him where we want him.
LL

EXHIBIT "8"

TRAN

ORIGINAL

FILED
JUN 20 3 31 PM '11
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

NORMAN KEITH FLOWERS,

Defendant.

CASE NO. C216032

DEPT. VIII

05C216032
TRANS
Transcript of Proceedings
1480178

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE

FRIDAY, JUNE 10, 2011

TRANSCRIPT OF PROCEEDINGS
CALENDAR CALL

APPEARANCES:

For the State: ELISSA LUZAICH, ESQ.
PAM WECKERLY, ESQ.
Chief Deputy District Attorneys

For the Defendant: DAVID M. SCHIECK, ESQ.
Special Public Defender

CLARK W. PATRICK, ESQ.
Deputy Special Public Defender

RECORDED BY: JILL JACOBY, COURT RECORDER

RECEIVED
JUN 20 2011
CLERK OF THE COURT

20

FRIDAY, JUNE 10, 2011 AT 8:39 A.M.

MR. PATRICK: Your Honor.

THE COURT: Yeah.

MR. PATRICK: May we approach?

THE COURT: Yeah.

[Bench Conference Begins]

MR. PATRICK: Good morning. I think we have this negotiated.

THE COURT: Okay.

MR. PATRICK: There's one small sticking point. Mr. Flowers would like to speak to his mom for about five minutes to make sure he's doing the right thing.

MS. LUZAICH: She's right there.

THE COURT: I don't care.

MS. WECKERLY: Yeah, we don't care either.

MS. LUZAICH: No.

MR. PATRICK: Let me --

THE COURT: Where's the officer?

We can all leave here.

MR. PATRICK: Yeah.

MS. LUZAICH: Yeah, we're going upstairs to get paperwork anyway. So.

THE COURT: Okay.

[Bench Conference Concludes]

THE COURT: Mr. Flowers wants to talk to his mother. This is his mother.

THE CORRECTIONS OFFICER: Uh-huh.

THE COURT: You can't touch him. Do you understand that, ma'am? You

can't hug him, can't -- in fact, if you want to sit Mr. Flowers here, she can -- we're going to move everybody out of the courtroom so that they -- you obviously will stay.

THE CORRECTIONS OFFICER: Uh-huh.

THE COURT: I don't get involved in that. But if there's anything you feel uncomfortable about, you pull him out. Okay?

THE CORRECTIONS OFFICER: Okay.

THE COURT: Don't touch him, hug him. You talk to her.

MR. SCHIECK: You understand you'll be in the front row and he'll be on the other side there in the front. They'll sit in the front.

THE COURT: It'll just be you and him and this officer. I can't do anything about that. But I'll pull my staff out.

[Matter trailed at 8:40 a.m.]

[Matter recalled at 9:46 a.m.]

THE COURT: C216032, Norman Flowers. Is this resolved?

MR. PATRICK: No, Your Honor.

THE COURT: Okay. Then we'll go to trial. You understand you're looking at the death penalty.

THE DEFENDANT: Yes.

THE COURT: Twice. And once we walk out the door, there's no negotiation, we're going to trial.

THE DEFENDANT: I want it resolved, but they want me to waive my right --

THE COURT: There won't --

THE DEFENDANT: -- my appeal on --

THE COURT: There won't be another negotiation. Do you understand? No chance.

THE DEFENDANT: They want me to waive --

THE COURT: None.

THE DEFENDANT: They want me to waive my right, Your Honor, on another case.

THE COURT: You know what? That's up to you.

MR. PATRICK: Norman, there's no chance you're going to get any action on the direct appeal. Okay?

THE COURT: There is no chance that you're going to get a better offer than today.

THE DEFENDANT: If I'm not going to get no action on direct appeal, why do I have to waive that right, then? It shouldn't matter.

THE COURT: Okay.

MR. PATRICK: Okay.

THE COURT: That's your privilege to -- I'm not -- I don't have a dog in the fight, I don't care one way or the other, I'm here for the next three weeks anyway. I've got it set trial. But understand, you have to take the decision that you've made. Do you understand? No deals once I leave this room. That's okay.

Monday morning at 9:30.

MS. WECKERLY: Your Honor --

MR. PATRICK: Your Honor, a couple of things, please. We need Mr. Flowers remanded today to CCDC.

THE COURT: All right.

MR. PATRICK: Also, do we have a schedule as -- are we going to be dark next Thursday or how is that going to work?

THE COURT: We're going to try and find a courtroom.

MR. PATRICK: Okay.

THE COURT: For the morning.

MR. PATRICK: Very good.

THE COURT: The afternoon we'll probably be able to try it from 1 o'clock on here.

MR. PATRICK: Okay. So 9:30 Monday?

THE COURT: Monday at 9:30.

MR. PATRICK: The last thing and I talked to the State about this. I have a DNA expert, his only available day would be Monday the 20th to testify. So even if we might have to call him out of order --

MS. WECKERLY: That's fine.

THE COURT: I don't care.

MS. WECKERLY: That's fine. So 9:30, Monday.

MS. LUZAICH: Can we just get a tentative schedule for your hours?

THE COURT: We start at 9:30. Tuesday, I vacated all of my civil except two cases so we should be ready by 9 o'clock on Tuesday.

MS. WECKERLY: Okay. Thank you.

THE COURT: Wednesday, 9:30. And we stop at 4:30, of course. Thursday, probably 1 o'clock, unless I can find a courtroom. And Friday, we could actually start at 8 o'clock, but that would difficult for --

MS. LUZAICH: No, no, no, no, no.

MR. PATRICK: That's fine, Your Honor.

THE COURT: Lisa --

MS. WECKERLY: No.

THE COURT: Lisa can't even get up that early.

MS. LUZAICH: I've got kids, I'm up, I'm just not here.

THE COURT: I've got kids, I'm up too. So.

MS. LUZAICH: Can we just start at 9 on Friday?

THE COURT: Yeah. Friday, we'll start at 9.

MS. LUZAICH: Thank you. And if the Court remembers, the second week, my daughter -- you were going to give me Wednesday morning off, the 22nd.

THE COURT: Yeah.

MS. LUZAICH: Thank you.

THE COURT: Or you -- maybe you don't have to be here.

MS. LUZAICH: No, no, no.

MR. SCHIECK: Judge, can you sit for one second? Just -- please. Thank you very much, Your Honor.

[Pause in proceeding]

MS. LUZAICH: Judge, do you bring in 65 in Monday and 65 Tuesday?

THE COURT: [Nods head yes.]

MS. LUZAICH: Oh. Oh, okay.

MR. PATRICK: Oh, do we want to put together a -- I've got a list of ours that we would excuse for cause without even bringing them in.

Oh, okay. Never mind.

MS. LUZAICH: But there were two jurors that you had copies of one --

MR. PATRICK: Right. Right.

MS. LUZAICH: -- had travel plans and the other something.

THE CLERK: I have copies right here. I have one for -- one for each side.

MS. LUZAICH: Thank you.

[Colloquy among counsel]

MS. LUZAICH: I had two jurors that were going, like, planning on being out of town on Monday. Like, are they already excused? One was leaving town on the 12th. No?

THE COURT: I haven't excused anybody.

MS. LUZAICH: Okay. I just -- I had one that was leaving town on the 12th.

THE COURT: I gave you the two documents that I got. That's all I've done. I haven't --

MS. WECKERLY: Okay. We -- if we have a list of agreed-upon people --

THE COURT: Yeah.

MS. WECKERLY: -- and we get it to the Court this afternoon.

THE COURT: Yep.

[Colloquy among Counsel]

MR. PATRICK: Judge, I'm sorry, this case has been negotiated.

MS. LUZAICH: Oh, okay.

THE COURT: Okay. What's the negotiation?

MR. PATRICK: Could we have five minutes to go over --

THE COURT: Yep.

MR. PATRICK: -- the Guilty Plea Agreement with Mr. Flowers, please.

THE COURT: Yep. I'll just sit right here. You tell me when you're ready. Or do you want me to leave?

MS. LUZAICH: I'm going to give Kathy the Amended Indictment --

THE COURT: If you want me to leave, I'll leave.

MS. LUZAICH: -- just so that she has it.

THE CLERK: I won't file it yet.

[Pause in proceedings]

MR. PATRICK: Your Honor, may I approach and have these filed in open court?

THE COURT: Yes.

THE CLERK: Amended Indictment.

MR. PATRICK: Oh, for me?

THE CLERK: One for you and one for the State.

THE COURT: This is C216032, State of Nevada versus Norman Flowers. Is this resolved?

MR. PATRICK: It is, Your Honor.

THE COURT: Negotiations.

MR. PATRICK: Your Honor, today Mr. Flowers is going to plead guilty pursuant to *North Carolina v Alford* on Counts 1 and 2 of the Amended Indictment charging first-degree murder. The parties have stipulated to sentence on Count 1 of life in prison without the possibility of parole. On Count 2, the parties have stipulated to a sentence of life in prison with the possibility of parole. Count 2 to run concurrent to Count 1. And Count 1 to run consecutive to C228755.

MS. WECKERLY: That's correct, Your Honor. It'll be the sentence in this case that'll run consecutive to C228755. And the Defendant --

MR. PATRICK: Oh, I'm sorry.

MS. WECKERLY: Go ahead.

MR. PATRICK: Okay. And the Defendant is withdrawing his appeal under Supreme Court Case Numbers 53159 and 55759.

THE COURT: Is that your understanding of the negotiations, sir?

THE DEFENDANT: Yes.

THE COURT: Do you accept those negotiations after discussing the matter

fully with your three attorneys?

THE DEFENDANT: Yes.

THE COURT: You read, write, and understand English?

THE DEFENDANT: Yes.

THE COURT: You've had a chance to read through your Guilty Plea Agreement and your Amended Indictment, discuss that fully with your attorney and you understand them?

THE DEFENDANT: Yes.

THE COURT: The Amended Indictment indicates on or about May 3rd, 2005, that you committed Count 1, first-degree murder where you did then and there willfully, feloniously, without authority of law with premeditation, deliberation, or with malice aforethought to kill a victim, a human being, Marilee Coote, by manual strangulation with hands and/or an unknown object. Defendant being responsible on one or more of the following principles or criminal liability: (1) by killing Marilee Coote with premeditation, deliberation, and malice aforethought; and/or (2) by killing Marilee Coote during the perpetration or attempted perpetration of a sexual assault or burglary.

And Count 2, first-degree murder, did then and there willfully, feloniously, without authority of law and with premeditation and deliberation with malice aforethought kill Rena Gonzales, a human being, by manual strangulation. Defendant being responsible under one or more of the following principles of criminal liability to wit: (1) by killing Rena Gonzales with premeditation, deliberation, and malice aforethought; and/or Number 2, by killing Rena Gonzales during the perpetration or attempted perpetration of sexual assault and/or burglary.

You've read that and discussed that fully with your attorney. And do

you have any questions for the Court about your Amended Indictment?

THE DEFENDANT: No.

THE COURT: Now, it's my understanding that you wish to plead guilty pursuant to the *Alford* plea; is that correct?

THE DEFENDANT: Correct.

THE COURT: That means you're not admitting guilt, but you have heard the evidence as the State's going to present it and you believe that they will meet their burden of proof and to avoid a harsher sentence on one or more counts, you've agreed to enter this plea; is that correct?

THE DEFENDANT: Yes.

THE COURT: What would the State prove?

MS. WECKERLY: Your Honor, on May the 3rd at 2005 at the Silver Pines Apartments some --

THE COURT: Listen to what she says because I'm going to ask if that's what they prove, not that you're pleading guilty to it, but you think that's what she would prove.

MS. WECKERLY: Silver Pines Apartment employees discovered the body of Marilee Coote lying in her living room. She was lying face up and she was completely nude. Inside of her belly button were ashes from burned incense. The skin between her upper thighs and pubic area was burned. Her apartment was locked, but her purse and keys were missing. Inside of her washing machine and inside of her bathtub, police found personal photos, bills, and identification belonging to Ms. Coote. The items appeared to have gone through a wash cycle.

At autopsy, the doctor concluded that she died as a result of strangulation. He also noted tearing in the area of her labia and anal area

consistent with the sexual assault that was antemortem. Ms. Coote also had contusions on her forearms and upper arms.

Another lady who was at the apartment complex that day is named Juanita Curry. Between 7 and 10 a.m., Mr. Flowers was seen by Ms. Curry and had several conversations with her. Ms. Curry had a conversation with Mr. Flowers about police and paramedics going in and out of Coote's apartment, and Curry described Mr. Flowers as turning away and avoiding looking at the police when they come -- when they came down the stairs. In his interactions with Juanita Curry, he repeatedly asked to use her phone, he came back and asked for water, he asked to use her bathroom. She agreed with all these requests, but she always stepped out of her apartment when he stepped inside of it. During their final encounter, he commented that the police made her -- made him nervous. And he also tried to kiss her when he separated from her.

Ms. Curry observed Mr. Flowers in the area of the doorway to another lady's apartment at the complex that morning and that's a woman by the name of Rena Gonzales. At 4 o'clock that afternoon, Rena Gonzales's two school-aged daughters returned home and found their mother on her knees leaning across her bed in the master bedroom. Her apartment was completely clean but there was a broken plastic hairpiece in the doorway and one of her shoes indicating there was an area struggle near the doorway.

A black phone cord and black lanyard were around the neck of Rena Gonzalez. She was dressed in shorts which were slightly pulled down and then the pair or the matching hairclip from the one in the doorway was found on her head.

At autopsy, Dr. Simms noted extensive bruising to her right breast, her right arm, her right leg. He concluded that she died as a result of strangulation. He

also noted tearing to her vaginal and anal area.

It was a woman who lived in the apartment complex by the name of Mawusi Ragland who Mr. Flowers had socialized with in the past. He called her on the evening that the two homicides were discovered and Ms. Ragland brought up the fact that the two women had been killed and that she was acquainted with them and Mr. Flowers commented as to Rena Gonzales: I didn't kill her.

Mr. Flowers' DNA was found in the vaginal swabs taken from Marilee Coote at autopsy. His DNA was also found in the piece of carpet under which -- or, well, that Marilee Coote was lying upon. And his DNA was specifically found in the area where her legs and pubic area would have been.

The State also had evidence that three months earlier, and this was admitted as a result of a bad acts motion, Mr. Quarles -- or Mr. Flowers' DNA was found in the vaginal area of a young woman 18 years old by the name of Sheila Quarles. Ms. Quarles actually had two DNA samples found in her when she was killed and she also had indications of sexual assault. The one DNA source was an individual by the name of George Brass, but he had an alibi and had checked into work by the time of the murder. The other individual whose DNA was identified was Mr. Flowers. And the police later learned through investigation that Mr. Flowers was acquainted with Sheila Quarles because he had dated her mother.

As a result of these facts as to the instant case, the State would be able to establish as to Marilee Coote, charges of murder, sexual assault, burglary, and robbery. As to Rena Gonzales, the charges, because of the lanyard, would be murder with a deadly weapon, sexual assault, burglary, and robbery.

THE COURT: This happened in Clark County, Nevada.

MS. WECKERLY: That's correct.

THE COURT: Is that your understanding what the State probably would prove at trial?

THE DEFENDANT: I can't really say.

THE COURT: Do you have any quarrel with them proving that at trial? You've talked to your attorneys.

THE DEFENDANT: All I know, Your Honor, is I want to do this, but --

THE COURT: Ask -- talk --

[Colloquy between Counsel and Defendant]

THE DEFENDANT: One of their cases alone forensic evidence says I wasn't even in --

THE COURT: All right.

THE DEFENDANT: -- the resident.

THE COURT: All right. I understand. You've talked to your attorneys. The State had to give an offer of proof what they would prove at trial. And you're going to plead guilty not because you are guilty because they would prove that at trial and you're trying to avoid a harsher penalty; is that right?

[Colloquy between Counsel and Defendant]

MR. SCHIECK: I think the question is: Do you understand that that's the evidence that the State would intend to present at trial?

THE DEFENDANT: Yes.

THE COURT: Okay. Both parties stipulate to a sentence of life in prison without the possibility of parole on Count 1. Parties stipulate to a sentence of life in prison with the possibility of parole in Count 2. Count 2 to run concurrent to Count 1. Defendant stipulates that the sentence will in this case will run consecutive to C228755. Defendant agrees to withdraw his appeal in Supreme Court

Case 53159 and 55759.

Is that your stipulation?

MR. PATRICK: Yes, Your Honor.

THE DEFENDANT: Yes.

THE COURT: Do you agree to forfeit any and all weapons that of -- or interest in any weapons seized in conjunction with the instant case or cases that will be dismissed?

I don't think any weapons were taken, were there?

MS. LUZAICH: That's correct.

THE COURT: Okay. We can probably do this from a PSI from that other case in a week.

MS. WECKERLY: Yeah, I think that would work.

THE COURT: You understand we could do this from a PSI from that other case that we wouldn't have to go to another interview with Department of Parole and Probation.

MR. PATRICK: Your Honor --

THE COURT: Do you want a new PSI?

MR. PATRICK: We don't necessarily want a new PSI, but --

MR. SCHIECK: Maybe an amended one. So.

MR. PATRICK: Maybe an amended one, so could we have 30 days?

THE COURT: Yes. By pleading guilty pursuant to the *Alford* decision, it is your desire to avoid the possibility of being convicted of more offenses or of a greater offense if you were to proceed to trial on the original charges and of also receiving a greater penalty. You understand that your decision to plead guilty by way of the *Alford* decision does not require you to admit guilt, but is based upon

your belief that the State would present sufficient evidence at trial that a jury would return a verdict of greater -- of a greater offense or of more offenses in that to which you are pleading guilty; is that correct?

THE DEFENDANT: Yes.

THE COURT: You understand that as a consequence of your plea of guilty by way of the *Alford* decision, the Court must sentence you on each count to a term of life without the possibility of parole or life with the possibility of parole with parole eligibility beginning 20 years -- after 20 years has been served. And you understand the law requires you to pay an administrative assessment fee.

THE DEFENDANT: Yes.

THE COURT: You understand, if appropriate, the Court will order you to make restitution for the victims of the offenses?

THE DEFENDANT: Yes.

THE COURT: You understand you're not eligible for probation for the offense to which you are pleading guilty?

THE DEFENDANT: Yes.

THE COURT: You also understand if you haven't -- you probably have submitted to a blood or saliva test under the direction of P&P to determine the genetic markers or secretor status and pay for that.

THE DEFENDANT: Yes.

THE COURT: Probably already done that.

MR. PATRICK: It has been, Your Honor.

THE COURT: You further understand that if more -- well, I'm going to follow the recommendation. But if more than one sentence is imposed, it's up to the Judge. I'm telling you by this negotiation, I'm going to follow the recommendation of

the parties.

You understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the Judge at sentencing.

THE DEFENDANT: Yes.

THE COURT: You've not been promised or guaranteed any particular sentence by anyone other than what's been mentioned here in court?

THE DEFENDANT: Yes.

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: Yes.

THE COURT: We're going to order a P&P report update of the PSI from C228755 and ask them to do that within a 30-day period.

By entering your -- and that may include hearsay information that I can rely on. You understand that?

THE DEFENDANT: Yes.

THE COURT: The PSI. By entering a plea of guilty, you understand or waiving and forever giving up the following privileges: Number 1, the constitutional privilege against self-incrimination, including the right to refuse to testify at trial in which event prosecution would not be allowed to comment to the jury about your refusal to testify.

MR. PATRICK: Excuse me, Your Honor.

THE COURT: Sure.

[Colloquy between Counsel and the Defendant]

THE DEFENDANT: Yes.

THE COURT: Number 2, the constitutional right to a speedy and a public trial

by an impartial jury free of excessive pretrial publicity prejudicial to the defense at which trial you would be entitled to the assistance of an attorney either appointed or retained. At trial, the State would bear the burden of proof beyond a reasonable doubt each element of the offenses charged. You understand that?

THE DEFENDANT: Yes.

THE COURT: You're giving up the constitutional right to confront and cross-examine any witnesses who would testify against you, constitutional right to subpoena witnesses to testify on your behalf. And the right -- excuse me -- to testify in your own defense. You understand?

THE DEFENDANT: Yes.

THE COURT: You're also giving up the right to appeal your conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and upon agreed as provided by NRS 174.035.

You understand this means that you are unconditionally waiving your right to a direct appeal of this conviction, including any challenge based upon reasonable, constitutional, jurisdictional, or other grounds that challenge the legality of these proceedings as stated in NRS 177.051. However, you will remain free to challenge any conviction through post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34. You understand that?

THE DEFENDANT: Yes.

THE COURT: You've discussed the elements of the original charges against you with your attorneys, and you understand the nature of the charges today?

THE DEFENDANT: Yes.

THE COURT: You understand the State would have to prove each element of the charge against you at trial beyond a reasonable doubt to convict you?

THE DEFENDANT: Yes.

THE COURT: You've discussed with your attorney any possible defenses, defense strategies, and circumstances which might be in your favor?

THE DEFENDANT: Y es.

THE COURT: All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to you by your attorney?

THE DEFENDANT: Yes.

THE COURT: You believe that pleading guilty through the *Alford* decision and accepting this plea bargain is in your best interest and that a trial would be contrary to your best interest?

THE DEFENDANT: Yes.

THE COURT: You signed this Guilty Plea Agreement voluntarily after consultation with your attorney and you weren't acting under duress or coercion by virtue of any promises of leniency except for those set forth in this agreement?

THE DEFENDANT: Yes.

THE COURT: You are not under the influence of anything now that would impair your ability to comprehend or understand this agreement for the proceeding surrounding your entry of plea?

THE DEFENDANT: No.

THE COURT: Your attorneys have answered all your questions regarding this Guilty Plea Agreement and its consequences to your satisfaction and you're satisfied with their services?

THE DEFENDANT: Can you say that again, please?

THE COURT: Your attorney has answered all of your questions regarding this Guilty Plea Agreement that I'm showing you that you signed to your satisfaction

and its consequences to your satisfaction and your satisfied with the services provided by all three of your attorneys?

THE DEFENDANT: Yes.

THE COURT: Okay. I'll accept the plea. We'll set it down for sentence. We'll ask the Department of Parole and Probation to do an updated PSI.

Thank you, Mr. Flowers. Thank you, Counsel.

MR. SCHIECK: Your Honor, I believe we'll also be contacting the department to point out some areas --

THE COURT: Okay.

MR. SCHIECK: -- that we think need to be corrected. So that --

THE COURT: Under that new case that's come down.

MR. SCHIECK: -- we'll copy --

THE COURT: All right.

MR. SCHIECK: We'll copy the DA on that.

THE COURT: Right.

MR. SCHIECK: Right. Because we can't correct it later.

THE COURT: Right.

MR. SCHIECK: And also we need to rescind the order of remand, he can go ahead and go back up to the --

THE COURT: And go back to the prison. Okay. Thank you.

THE CLERK: That's July 13th, 8 a.m.

MR. PATRICK: You know, I'm going to be out of the jurisdiction. Can we do it, like, two weeks past that?

THE CLERK: Two weeks past?

MR. PATRICK: Please. Or no, just one week.

THE CLERK: One week?

MR. PATRICK: Yeah.

THE DEFENDANT: Two weeks is fine.

THE CLERK: July 20th.

MR. PATRICK: July 20th? That's fine.

THE CLERK: A Wednesday.

THE COURT: Thank you.

MR. PATRICK: Very good.

[Proceeding concluded at 10:22 a.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case.

Jill Jacoby
Court Recorder

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS,
aka Norman Harold Flowers III, #1179383

Defendant.

CASE NO: 05C216032

DEPT NO: VIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: MAY 9, 2016
TIME OF HEARING: 8:00 AM

THIS CAUSE having come on for hearing before the Honorable DOUGLAS E. SMITH, District Judge, on the 9th day of May, 2016, the Petitioner being present, represented by KAREN ANN CONNOLLY, Esq., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through PAMELA C. WECKERLY, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On October 14, 2005, NORMAN KEITH FLOWERS, aka Norman Harold Flowers III (hereinafter "Defendant") was charged by way of Indictment with the following: COUNT 1 – Burglary (Felony – NRS 205.060); COUNT 2 – Murder (Felony – NRS 200.010, 200.030);

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COUNTS 3 & 4 – Sexual Assault (Felony – NRS 200.364, 200.366); COUNT 5 – Robbery (Felony – NRS 200.380); COUNT 6 – Burglary while in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165); COUNT 7 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); COUNTS 8 & 9 – Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); COUNTS 10 & 11 – Unlawful Sexual Penetration of Dead Human Body (Felony – NRS 201.450); and COUNT 12 – Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165). On November 8, 2005, the State filed a Notice of Intent to Seek the Death Penalty. The Notice of Intent to Seek the Death Penalty was amended on February 4, 2009.

Various motions and oppositions to those motions were filed between February 5, 2009, and June 9, 2011. On June 10, 2011, pursuant to negotiations, the State filed an Amended Indictment charging Defendant with two counts of First Degree Murder (Category A Felony – NRS 200.010, 200.030). Defendant pleaded guilty pursuant to the Guilty Plea Agreement and North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970), to the charges as contained in the Amended Indictment. Under the terms of the Guilty Plea Agreement, Defendant agreed to withdraw his appeals in Nevada Supreme Court Case Nos. 53159 and 55759, and the parties stipulated to a sentence of Life Without the Possibility of Parole for COUNT 1 and Life With the Possibility of Parole for COUNT 2, concurrent with COUNT 1 but consecutive to District Court Case Number C228755. The Guilty Plea Agreement was filed on that same day.

On June 28, 2011, Defendant filed a Motion to Withdraw Plea. The State filed an Opposition on July 11, 2011. On July 27, 2011, this Court denied Defendant's Motion. The Findings of Fact, Conclusions of Law and Order were filed on August 23, 2011.

On August 18, 2011, Defendant was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: COUNT 1 – Life without the possibility of parole; COUNT 2 – Life with the possibility of parole after 25 years, concurrent with COUNT 1; sentence to run consecutive to Case Number C228755. The Judgment of Conviction was filed on September 20, 2011.

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Defendant filed a Notice of Appeal on September 20, 2011. The Nevada Supreme Court affirmed the Judgment of Conviction on December 13, 2012. See Order of Affirmance, Docket No. 59250. Remittitur issued on January 9, 2013.

On October 17, 2013, Defendant filed a Motion for Appointment of Attorney. The State filed a Response on November 7, 2013. On November 18, 2013, this Court appointed Karen A. Connolly, Esq. to represent Defendant in post-conviction proceedings. On January 13, 2014, Ms. Connolly appeared before this Court and confirmed as counsel. At that same time, the State stated that the one-year time period in which to file a post-conviction habeas petition had lapsed. This Court stated that the matter was continued for appointment of counsel and declared the matter stayed. The State then reserved the right to assert any applicable procedural bars should Defendant file a post-conviction habeas petition.

On January 15, 2014, through counsel, Defendant filed his Petition for Writ of Habeas Corpus (Post-Conviction). The State filed its Response and Motion to Dismiss on February 14, 2014. On August 21, 2014, a Stipulation and Order to Extend Briefing Schedule and Continue Status Check Hearing was filed. On February 4, 2015, Defendant filed a Motion Requesting an Additional 120-days to File Supplement to Writ of Habeas Corpus (Post-Conviction). This Court granted the Motion. On June 15, 2015, Defendant filed another Motion Requesting Additional Time and was granted more time. On February 1, 2016, Defendant filed a Motion Requesting Additional Time to File Supplemental Writ of Habeas Corpus (Post-Conviction). The State filed its Opposition on February 3, 2016. On February 17, 2016, this Court granted the Motion and set a briefing schedule.

On February 12, 2016, Defendant filed the Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). The State's Response was filed on March 24, 2016. Defendant filed a Reply on May 2, 2016. On May 9, 2016, this Court heard arguments on the Petition, the findings of fact, conclusions of law and order follow.

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I. DEFENDANT'S ATTEMPT TO INCORPORATE BY REFERENCE ARGUMENTS FROM CASE NUMBER C228755 FAILS PURSUANT TO NRS 34.735(5)

The Court finds that Defendant attempted to incorporate by reference arguments made in another of his cases, Case Number C228755 despite the requirements set forth in NRS 34.735. Supplement, pp. 2-3. Specifically, NRS 34.735(5) states "[y]ou must include all grounds or claims for relief." Therefore, the Court finds that incorporation by reference is insufficient to present a claim and as such Defendant has waived these arguments. NRS 34.735(5); Evans v. State, 117 Nev. 609, 647, 29 P.3d 498, 523 (2001).

II. CHALLENGES TO DEFENDANT'S PLEA

The Court finds that Defendant's allegation that the State did not comply with its obligation under the plea negotiations to contact the Inspector General to request Defendant be placed at Lovelock is belied by the record. Supplement, pp. 3-4; Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) ("bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record). Defendant himself included an email from Chief Deputy District Attorney Lisa Luzaich, showing that she complied with the negotiations. Supplement to Petition, Exhibit 7. Accordingly, the Court finds Defendant is not entitled to post-conviction relief on this claim.

The Court also finds that Defendant's allegation that this Court improperly interjected itself into plea negotiations in violation of State and Federal law is belied by the record. Supplement, pp. 4-8; Hargrove, 100 Nev. at 503, 686 P.2d at 225. The Nevada Supreme Court noted on direct appeal that "[t]he record also demonstrates that Flowers entered his plea voluntarily and was not coerced into taking the plea by counsel's actions or *statements by the district court*." Order of Affirmance, Docket No. 59250, p. 2 (December 13, 2014) (emphasis added). The Court further finds that Defendant attempted to challenge his plea through these allegations when he had already attacked his plea by filing a motion to withdraw plea and on direct appeal. The Court finds these allegations should have been raised on direct appeal, and Defendant's failure to do so resulted in these claims being waived. NRS 34.724(2)(a); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other

grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Therefore, the Court finds that Defendant's allegations are belied by the record and are also waived.

III. DEFENDANT'S PETITION IS TIME BARRED UNDER NRS 34.726

The Court finds Defendant's Petition for Writ of Habeas Corpus is time barred. The pertinent part of NRS 34.726(1) states: "[u]nless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed . . . within 1 year after the Supreme Court issues its remittitur." Under this statute, good cause for delay exists if the petitioner can demonstrate that the delay is not the fault of the petitioner and that dismissal of the petition as untimely will unduly prejudice the petitioner.

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). Moreover, the one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed 2 days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the notice within the one-year time limit. Gonzales reiterated the importance of filing the petition within the mandatory deadline, absent a showing of "good cause" for the delay in filing. 118 Nev. at 590, 53 P.3d at 902.

In the present case, the order affirming Defendant's Judgment of Conviction was filed on December 13, 2012, and remittitur issued on January 9, 2013. Therefore, the Court finds that the one-year time bar began to run from January 9, 2013. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). Defendant's petition was filed on January 15, 2014, 6 days past the mandatory one year deadline. As such, the Court finds Defendant's claims are denied because of Defendant's tardy filing.

IV. DEFENDANT FAILED TO DEMONSTRATE GOOD CAUSE AND PREJUDICE

A showing of good cause and prejudice may overcome the procedural bars. Under NRS 34.726(1), a petitioner must demonstrate: (a) "[t]hat the delay is not the fault of the petitioner"

and (b) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. Under the first requirement, "a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986) (citations and quotations omitted)). Clearly, any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a). Once a petitioner has established cause, he must show actual prejudice resulting from the errors of which he complains, i.e., "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." State v. Huebler, 128 Nev. ___, ___, 275 P.3d 91, 94-95 (2012) (citing Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 716 (1993)).

The Court finds that Defendant failed to address his procedural default. The original Petition erroneously contended that Defendant filed in a timely fashion. Petition, p. 3. The Supplement is silent on the issue. This failure is construed as an admission that the procedural bars apply. DCR 13(2); EDCR 3.20(b); Polk v. State, 126 Nev. ___, ___, 233 P.3d 357, 360-61 (2010).

The Court finds Defendant's allegation that the State violated the plea agreement fails as good cause. As stated above, this allegation is belied by the record. Hargrove, 100 Nev. at 503, 686 P.2d at 225. The terms of the negotiation were that the State would "make some efforts or would at least talk to the Inspector General's Office and ask that Defendant be placed in Lovelock." Transcript of Proceedings Sentencing COUNTS 1 & 2 Plea Status Check: Hearing Defendant's Pro Per Motion to Withdraw Plea, p. 38 (August 18, 2011). Defendant himself included an email from Chief Deputy District Attorney Lisa Luzaich, showing that she

complied with the negotiations. Supplement, Exhibit 7. The email clearly states that the State "called to ask that he be housed at Lovelock." Id. Thus, the Court finds this allegation is belied by the record and therefore Defendant's claim does not establish good cause and prejudice.

The Court also finds that Defendant's allegation that the Court interjected itself into the plea negotiations does not establish good cause and prejudice. First, Defendant was unable to establish an impediment external to the defense that precluded raising this issue during the litigation of the motion to withdraw guilty plea, direct appeal, or in a timely filed petition. Second, Defendant failed to establish prejudice since the underlying claim is meritless. As stated above, the Nevada Supreme Court noted in Defendant's direct appeal that "[t]he record also demonstrates that Flowers entered his plea voluntarily and was *not coerced into taking the plea by counsel's actions or statements by the district court.*" Order of Affirmance, Docket No. 59250, p. 2 (December 13, 2014) (emphasis added). Third, the Court was merely executing its duty to create a record that Defendant understood the information being presented to him. Therefore Defendant's allegation under Cripps v. State, 122 Nev. 764, 770-71, 137 P.3d 1187, 1191 (2006), is belied because the Court did not "participate in plea negotiations[.]" This Court made it clear to Defendant that it was his privilege to decide whether or not to enter into the offered negotiations but the Court needed to be sure that Defendant understood he was facing the death penalty if he continued to trial. Transcript of Proceedings Calendar Call, June 10, 2011, pp. 3-4. Thus, the Court finds that Defendant is unable to establish good cause and prejudice through this allegation.

Lastly, the Court finds that Defendant's allegation that trial and appellate counsel were ineffective for failing to challenge Defendant's plea on the basis of attorney statements and judicial involvement in the negotiations does not establish good cause and/or prejudice. Supplement, pp. 8-10. The Court finds that Defendant cannot establish good cause because these arguments could have been raised in a timely filed petition. Defendant did not attempt to explain the delay in raising these claims and as such the Court finds they are defaulted. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005)

("A claim of ineffective assistance of counsel may also excuse a procedural default if counsel was so ineffective as to violate the Sixth Amendment. However, in order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted. In other Words, a petitioner must demonstrate cause for raising the ineffective assistance of counsel claim in an untimely fashion"). Further, the Court finds Defendant is unable to establish prejudice because the underlying claims are meritless. As stated above, the judicial involvement claim fails, and the Nevada Supreme Court already held that the statement by counsel was not deficient or prejudicial. Order of Affirmance, Docket No. 59250, p. 2 (December 13, 2014). As a result, the Court finds Defendant is unable to overcome the strict time bar. See Pellegrini, 117 Nev. at 873-74, 34 P.3d at 528. Therefore, Defendant's petition is denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 22 day of June, 2016.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF SERVICE

I certify that on the 1st day of June, 2016, I e-mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

KAREN ANN CONNOLLY, Esq.
advocate@kconnollylawyers.com

BY _____
R. JOHNSON
Secretary for the District Attorney's Office

NO/JEV/rj/M-1

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Electronically Filed
Mar 01 2017 08:12 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court No. 70933
District Court Case No. 05C216032

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Attorney of Record for Appellant: Karen A. Connolly
2. Publicly-held Companies Associated: None
3. Law Firm(s) Appearing in the Court(s) Below: Karen A. Connolly, Ltd.

DATED this 28th day of February 2017.

KAREN A. CONNOLLY, LTD.

s/ Karen A. Connolly
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I. STATEMENT OF JURISDICTION

Defendant was convicted of First Degree Murder on August 18, 2011. On September 20, 2011, a Judgment of Conviction was entered. Defendant filed a Notice of Appeal on September 20, 2011. The Nevada Supreme Court affirmed the Judgment of Conviction on December 13, 2012. On October 17, 2013, Defendant filed a Motion for Appointment of Attorney. The State filed a Response on November 7, 2013. On November 18, 2013, this Court appointed Karen A. Connolly to represent Defendant in post-conviction proceedings. On January 13, 2014, undersigned appeared before this Court and confirmed as counsel. On January 15, 2014, Defendant filed his Petition for Writ of Habeas Corpus (Post-Conviction). The State filed its Response and Motion to Dismiss on February 14, 2014. On February 12, 2016, Defendant filed the Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). The State's Response was filed on March 24, 2016. Defendant filed a Reply on May 2, 2016. On May 9, 2016, this Court heard arguments on the Petition. Notice of Entry of Finding of fact, Conclusions of Law was filed on June 30, 2016. Notice of Appeal was filed on July 27, 2016.

II. ROUTING STATEMENT

Pursuant to NRAP 17, this case will be presumptively assigned to the court of appeals.

III. ISSUES PRESENTED FOR REVIEW

The issue is whether or not the district court erred in denying Flower's Petition

of Writ of Habeas corpus (Post Conviction) and in the alternative denying Flowers and evidentiary hearing.

IV. STATEMENT OF CASE

On October 14, 2005, NORMAN KEITH FLOWERS, aka Norman Harold Flowers was charged by way of Indictment as follows: COUNT 1 -5 Burglary (Felony- NRS 205.060); COUNT 2- Murder (Felony- NRS 200.010, 200.030); COUNTS 3 & 4- Sexual Assault (Felony- NRS 200.364, 200.366); COUNT 5 - Robbery (Felony- NRS 200.380); COUNT 6- Burglary while in Possession of a Deadly Weapon (Felony- NRS 205.060, 193.165); COUNT 7 - Murder With Use of a Deadly Weapon (Felony- NRS 200.010, 200.030, 193.165); COUNTS 8 & 9- Sexual Assault With Use of a Deadly Weapon (Felony -NRS 200.364, 200.366, 193.165); COUNTS 10 & 11- Unlawful Sexual Penetration of a Dead Human Body (Felony - NRS 201.450); and COUNT Robbery With Use of a Deadly Weapon (Felony- NRS 200.380, 193.165). Appellant was arraigned and plead not guilty on October, 18, 2005. The State filed Notice of Intent to Seek the Death Penalty on November 8, 2005 and an Amended Notice of Intent to Seek Death Penalty on February 4, 2009. The victims in the instant case were Marillee Coote and Rena Gonzales.

On December 26, 2006, the State sought to consolidate the instant matter with District Court Case Number 6C228755 in which Flowers was charged with the murder of Sheila Quarles. The motion was denied. Flowers proceeded to trial in that

capital case and was convicted of first degree murder, sexual assault, burglary and not guilty of robbery. He was sentenced to life without the possibility of parole on the murder charge. He appealed that conviction. The appeal was dismissed as part and parcel of the negotiations in the instant matter.

On June 10, 2011, pursuant to negotiations, the State filed an Amended Indictment charging Defendant with two counts of First Degree Murder (Category A Felony NRS 200.010, 200.030). Defendant pleaded guilty pursuant to the Guilty Plea Agreement and North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970), to the charges as contained in the Amended Indictment. Under the terms of the Guilty Plea Agreement, Defendant agreed to withdraw all appeals in Nevada Supreme Court Case Flowers v. State, Docket # 53159 (Direct appeal-Judgeent of Conviction) and Flowers v. State, Docket# 5579 (Appeal from Denial of Request for a New Trial), and the parties stipulated to a sentence of Life Without the Possibility of Parole for COUNT 1 and Life With the Possibility of Parole for COUNT 2, concurrent with COUNT 1 but consecutive to District Court Case Number C228755. The Guilty Plea Agreement was filed on that same day.

On June 28, 2011, Defendant filed a Motion to Withdraw Plea. The State filed an Opposition on July 11, 2011. On July 27, 2011, the district court denied the motion. The Findings of Fact, Conclusions of Law and Order were filed on August 23, 2011. On August 18, 2011, Defendant was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: COUNT 1 - Life without the

possibility of parole; COUNT 2 - Life with the possibility of parole after 25 years, concurrent with COUNT 1;sentence to run consecutive to Case Number C228755. The Judgment of Conviction was filed on September 20, 2011.

Defendant filed a Notice of Appeal on September 20, 2011. The Nevada Supreme Court affirmed the Judgment of Conviction on December 13, 2012. See Order of Affirmance, Docket No. 59250. Remittitur issued on January 9, 2013.

On October 17, 2013, Defendant filed a Motion for Appointment of Attorney. The State filed a Response on November 7, 2013. On November 18, 2013, counsel was appointed to represent Defendant on post-conviction proceedings. On January 13, 2014, undersigned confirmed as counsel. At that same time, the State stated that the one-year time period in which to file a post-conviction habeas petition had lapsed. This Court stated that the matter was continued for appointment of counsel and declared the matter stayed. The State then reserved the right to assert any applicable procedural bars should Defendant file a post-conviction habeas petition. On January 15, 2014, through counsel, Defendant filed his Petition for Writ of Habeas Corpus (Post-Conviction). The State filed its Response and Motion to Dismiss on February 14, 2014. On February 12, 2016, Defendant filed the Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). The State's Response was filed on March 24, 2016. Defendant filed a Reply on May 2, 2016. On May 9, 2016, this Court heard arguments on the Petition. Notice of Entry of Findings of Fact, Conclusions of Law was filed on June 30, 2016. Notice of Appeal was filed on July 27, 2016.

V. ARGUMENT

1. FINDINGS AND ORDERS IN DEFENDANT'S COMPANION CASE ARE LAW OF THE CASE AND RELEVANT TO THE INSTANT MATTER

On December 26, 2006, the State sought to consolidate the instant matter with District Court Case Number 6C228755 in which Defendant was charged with the murder of Sheila Quarles. Appellant's Appendix (hereinafter AA) II AA, 424-436. The motion was denied. Defendant proceeded to trial in the capital case and was convicted of first degree murder, sexual assault, burglary and not guilty of robbery. He was sentenced to life without the possibility of parole on the murder charge. III AA 669-670. Defendant unsuccessfully appealed that conviction. Defendant pursued post conviction relief in that case contemporaneously with proceedings in this matter. The appeal from denial of post conviction relief was recently denied in that case[1]. Per negotiations in the instant matter, Defendant agreed to dismiss all appeals in that companion case. II AA 469-477. Since that case was disposed of in the plea negotiations, subsequent proceedings in that matter are inextricably intertwined with this matter. Consequently, Defendant sought to adopt and incorporate pleadings filed in the companion case in the district court below in the

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[1] State v. Flowers, Docket # 68140

Supplement to Petition for Writ of Habeas Corpus.[2] V AA 955-1098. In the Findings of Fact, Conclusions of Law and Order (hereinafter FOFCL) the district court indicated that it was denying the request citing NRS 34.735(5) and ruled that incorporating by reference was insufficient and therefore, Defendant has waived those arguments. V AA 1117.

Orders in case number C228755/Docket# 68140 are law of the case and relevant to this proceeding. Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975)

2. TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE IN FAILING TO ADDRESS THE DISTRICT COURT'S IMPROPER INTERFERENCE WITH PLEA NEGOTIATIONS

As a result of ineffective assistance of trial and appellate counsel. Defendant's Fifth, Sixth and Fourteenth Amendment rights to due process, to counsel, and to present a defense, as well as his correlative rights under the Nevada Constitution, article 1, section 8 were violated. To prevail on a claim of ineffective assistance of trial counsel, "a defendant must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 697 (1984); McConnell v. State, 125 Nev. 243, 212 P.3d 307, 313 (2009). A defendant is entitled to relief where "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result

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[2] At that time, Defendant was pursuing post conviction relief in the companion case, it had been briefed but no rulings entered.

is reliable." Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

The district court found that the court's interjection into plea negotiations should have ben addressed on direct appeal. V AA 1117. It was not due to ineffective assistance of counsel. James Oronoz[3] was appointed to represent Defendant on his motion to withdraw his guilty plea which took place prior to sentencing. IV AA 762. He failed to address the court's improper intervention in plea negotiations or the comments of counsel which added to the coerciveness of the plea. Consequently, Defendant did not receive effective assistance of counsel on his motion to withdraw his guilty plea in violation of his constitutional rights. Likewise, the issue was not addressed on direct appeal due to ineffective assistance of counsel.

(A) THE DISTRICT COURT'S INTERVENTION IN PLEA NEGOTIATIONS RENDERED THE GUILTY PLEA INVOLUNTARY AS A MATER OF LAW

In order to be valid, a guilty plea must be voluntary and intelligent, and cannot be the result of threats, misrepresentations, or improper promises. Hill v. Lockhart, 474 U.S. 52 (1985); Mabry v. Johnson, 467 U.S. 504 (1984). Although the district court entertained a motion to withdraw guilty plea, it was not addressed in the context of the court's improper intervention in plea negotiations which render the plea involuntary as a matter of law. This was raised for the first time on post conviction

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[3] Mr. Oronoz represented Flowers in the companion case on appeal from the denial of post conviction relief which was recently denied by this court. Flowers v. State, Docket # 68140

relief.

The Ninth Circuit has ruled that where comments by the district court regarding plea negotiations are all on the record, there is no factual dispute regarding their nature and a challenge thereto is a question of law. United States v. Bruce 976 F.2d 552 (9th Cir. 1992)

At the start of the hearing which took place at calender call, the parties advised the court they believed the case had been negotiated. According to defense counsel, there was one small "sticking point," Defendant wanted to speak with his mother. He was permitted to do so. The judge left the bench, prosecutors left and Flowers spoke with his mother privately in the court room. He did so for over an hour (8:40AM until 9:46 AM). When court resumed, defense counsel indicated that the matter was not resolved. This promoted the district court to respond as follows:

THE COURT: Okay. Then we'll go to Trial. You understand that you are looking at the death penalty.

THE DEFENDANT: Yes

THE COURT: **Twice.** And once we walk out the door there's no negotiation, we're going to trial.

THE DEFENDANT: I want it resolved, but they want me to waive my fight–

THE COURT: There won't-

THE DEFENDANT: – my appeal on–

THE COURT: **There won't be another negotiation. Do you**

understand? No chance.

THE DEFENDANT: They want me to waive-

THE COURT: None.

THE DEFENDANT: They want me to waive my right, Your Honor, on another case.

THE COURT: You know what? That's up to you.

MR . PATRICK: Norman, there's no chance you're going to get any action on that direct appeal. Okay?

THE COURT: **There is no chance that you're going to get a better offer than today.**

THE DEFENDANT: If I'm not going to get no action on direct appeal, why do I have to waive that right, then? It shouldn't matter.

THE COURT: Okay.

MR. PATRICK: Okay

THE COURT: That's your privilege to–I'm not–I don't have a dog in the fight, I don't care one way or another, I'm here for the next three weeks anyway. I've got it set for trial. But understand, you have to take a decision that you' made. Do you understand ? **No deals once I leave this room**. III AA 479-781. [Emphasis added]

After the colloquy between the court and Defendant, he changed his mind. III AA 485. The cause and affect is readily apparent: Defendant pled guilty because of

pressure from the district court. As a matter of law, the district court improperly pressured Defendant into taking a deal thereby rendering his guilty plea involuntary.

Under Federal Rule of Criminal Procedure 11(c) the court cannot participate in plea discussions. In federal practice there is a bright line prohibition of judicial participation in plea negotiations. United Sates v. Bruce, 976 F.2d 552 (9th Cir. 1992). Bruce holds that if the judge pressures the defendant into taking a deal, it is improper judicial intervention and the defendant is entitled to have the plea set aside.

In Cripps v. State, 122 Nev. 1187, 137 P.3d 1187 (2006) the Nevada Supreme Court adopted the federal bright-line rule prohibiting the district court from participating in plea negotiations between the State and the defense. The single exception carved out by the Nevada Supreme Court permits the district court to indicate whether or not it is inclined to follow the parties' sentencing recommendation.[4] Id.

Judicial involvement in the plea negotiations may constitute harmless error." Id. Cripps. See also NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). When conducting harmless error review, the focus is on "whether the district court's [erroneous participation] may reasonably be viewed as having been a material factor affecting the defendant's decision to plead guilty." The defendant carries the burden of establishing that any

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[4] Sentencing in state and federal court differs significantly in that in federal court, sentencing is dictated by the Federal Sentencing Guidelines.

reversible error occurred." Id. Cripps.

There is no doubt the district court acted improperly under Cripps. The district court's actions were material in Defendant's decision to plead guilty. The court improperly interjected itself into the negotiations warning Defendant that he was facing the death penalty and that he had been offered the best deal he would get,[5] that there was no chance of a better deal and that there would be no further plea negotiations even though no such representations had not been made by the State. The district court's intervention was material in Defendant's decision to plead guilty.

But for the court's improper interjection into plea negotiations, Defendant would not have pled guilty. The error is not harmless because it is clear from the record that the district court's participation was a material factor in Defendant's decision to plead guilty. See, Cripps, 122 Nev. at 771, 137 P.3d at 1192.

A plea agreement is a contract between the prosecutor and the defendant, United States v. Streich, 560 F.3d 926, 929–30 (9th Cir.2009), with the district court acting only as "a neutral arbiter of the criminal prosecution," United States v. Bruce, 976 F.2d 552, 557 (9th Cir.1992).

The risk of coercion is especially high where a district court pressures a defendant for an immediate change of his or her plea. In United States v. Anderson, 993 F.2d 1435 (9th Cir. 1993), the Ninth Circuit noted:

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[5] The offer had not yet been placed on the record so the court was not even aware of the terms of the offer when this statement was made.

> The judge's opening pronouncement that he would not after [the date of the hearing] accept a plea to fewer than all thirty counts of the indictment and admonishment that the government was not to "make any deals," aside from constituting improper judicial intervention in the plea negotiation process, ... meant that Anderson had to decide immediately whether he wished to change the not guilty plea he had just entered to one of guilty.... [I]t is difficult to imagine how Anderson could not have felt pressured when confronted with the court's "now or never" tactics at the ... hearing. Id.

This is precisely what occurred in the case at bar; the district court told Defendant three times that there would be no other negotiation. II AA 480-481. The court repeated this statement three times and stated "No deals once I leave this room."

The risk of coercion is even higher when a defendant must immediately respond to the judge's intervention on in plea negotiations. United States v. Gonzalez-Melchor, 648 F.3d 959, (9th Cir, 2011) The circuit court in Anderson determined that the judge placed unreasonable restraints on Anderson's decision making process and that those constraints rendered his guilty plea involuntary. Likewise in the instant matter, the district court's intervention caused Defendant to plead guilty and rendered his Alford plea involuntary. This is evident by the fact that within days of his plea, Defendant moved to withdraw the plea. The plea was entered on June 10, 2011. Defendant filed a motion to withdraw plea and to dismiss counsel on June 28, 2011. III AA 498-516.

Not only were the comments from the bench improper, likewise, the comment from defense counsel on the merits of Defendants' appeal in the companion case as

follows were improper and added to the coercive nature of the plea:

MR. PATRICK: "Norman, there's no chance you're going to get any action on the direct appeal. Okay?" III AA 481.

While the court was interjecting itself into plea negotiations, counsel announced that Defendant had no chance on his appeal in the companion case thereby applying additional pressure which only worsened the already coercive situation.

Defendant attempted to withdraw his plea. The same judge who accepted the plea canvass denied that motion. Under the circumstances, counsel was ineffective in failing to request that a different judge hear the motion.

In the FOFCL it is stated that Defendant's allegation that district court improperly interfered in proceedings in this regard is belied by the record. V AA 1118. To the contrary, the record clearly and unambiguous demonstrates the court's improper intervention into plea negotiations.

The FOFCL also indicates that on appeal, this court found that Defendant entered his plea knowingly and voluntarily and that it was not coerced by either counsel's actions or statements by the court. V AA 1117. However, it was not argued on appeal that the district court improperly interjected itself into plea negotiations. Rather, the focus in term of comments by the court was the plea colloquy.

(B) THE DISTRICT COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE IN DICTATING THAT THERE WOULD BE NO

MORE PLEA OFFERS

Whether or not a plea is offered is the province of the State. The district court may accept or reject a plea, but it cannot tell the State and Defense that no more pleas will be forthcoming. The judge is obligated to consider seriously any proffered plea. Sturrock v. State, 95 Nev. 938, 941, 604 P.2d 341, 343 (1979), Sparks.v. State 104 Nev. 316, 759 P.2d 180 (1988), Sandy v. Fifth Judicial District court In and For Nye County, 113 Nev. 435, 935 P.2d 1148(1997)

Whether or not a plea offer is extended and the type and nature of the offer is an executive function. Sentencing is a judicial function. Separation of powers requires that the judiciary remain independent of executive affairs. Prosecutors--representatives of the executive branch of the government--are not mere servants of the judiciary. The tradition of prosecutorial independence is recognized by case law . Bordenkircher v. Hayes, 434 U.S. 357(1978)

The judiciary may not invade the legitimate function of the prosecutor. Charging decisions are primarily a matter of discretion for the prosecution, which represents the executive branch of government. Bordenkircher v. Hayes, 434 U.S. 357(1978). In United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965), the court stated: It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions. Article 3, section 1 of the Constitution of the

State of Nevada also provides for similar separation of powers. The nature and type of plea offered is a function of the executive branch - the prosecutor, not the judicial branch-the judge. The district court violated the separation of powers doctrine and violated Defendant's constitutional right under United States Constitution, Amendment XIV, and Nevada Constitution, Article 1, Sec. 8. Appellate counsel was ineffective in failing to raise this meritorious issue on appeal.

(C) THE COURT'S INTERVENTION IN PLEA NEGOTIATIONS SHOULD HAVE BEEN RAISED IN THE MOTION TO WITHDRAW GUILTY PLEA AND THE APPEAL FROM THE DENIAL OF SAID MOTION

The FOFCL pointed out that the allegations should have been raised on direct appeal and Defendant's failure to do so constitutes a waiver. As stated, the issue was not raised due to ineffective assistance of counsel.

Not only was counsel ineffective in failing to raise the issue before the district court, but also in failing to raise the issue on appeal. To state a valid claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and resulting prejudice such that any omitted issue would have had a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996) Prior counsel failed to address the coercive nature of the guilty plea in light of the district court's impermissible intervention. Additionally, given

the conduct of the district court, counsel should have filed a motion requesting that the motion be heard by a different judge given the nature of the claim.

3. AN EVIDENTIARY HEARING SHOULD HAVE BEEN GRANTED ON THE ISSUE OF WHETHER OR NOT THE STATE HAD COMPLIED WITH THE TERMS OF THE GUILTY PLEA

A post-conviction habeas petitioner "'is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief.'" McConnell v. State, 125 Nev. Adv. Rep. 24, 212 P.3d at 314 (quoting Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002)) The district court erred in finding that the state had not violated the terms of the plea agreement without first having an evidentiary hearing.

As part of the plea negotiations, the State agreed to contact the Inspector General to request that Defendant be placed at Lovelock. V AA 1075. Defendant does not believe that the State complied thereby violating the terms of the plea negotiations. Therefore, he requested an evidentiary hearing which was denied.

During post conviction proceedings, Defendant obtained an email from the State which addressed inquiries made by the State in regards to Flowers' placement at Lovelock. Notwithstanding said email, the district court should have granted an evidentiary hearing. If the State did not contact the Inspector General's Office to request that Flowers be placed at Lovlelock, such failure would be a material violation of the terms of plea negotiations. Flowers requested permission to conduct

discovery in regard to the issue. V AA 964 His request was denied.

The United States Supreme Court has held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257 (1971). When the state enters a plea agreement, it is held to the most meticulous standards of both promise and performance. Citti v. State, 107 Nev. 89, 91, 807 P.2d 724, 726 (1991), Statz v. State, 113 Nev. 987, 944 P.2d 813 (1997). Violation of either the terms or the spirit of the agreement requires reversal. Id.

The court erred in failing to hold an evidentiary hearing on this issue.

4. DEFENDANT PROVED GOOD CAUSE AND PREJUDICE SUFFICIENT TO OVERCOME THE PROCEDURAL BAR

Defendant's petition was not timely filed. The petition was six (6) days late. Nevada's statutory post-conviction scheme places procedural limits on the filing of a post-conviction petition for a writ of habeas corpus. NRS 34.726(1) provides for dismissal of a post-conviction habeas petition if it is not filed within one year after this court issues its remittitur from a timely direct appeal from the judgment of conviction or, if no appeal has been prosecuted, within one year from the entry of the judgment of conviction. To overcome statutory procedural bars, a petitioner must demonstrate "good cause" for the default and actual prejudice. NRS 34.726(1); NRS 34.810(3). "Good cause" has been defined as a "substantial reason ... that affords a

legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) Brown v. McDaniel, 130 Nev. Adv. Opn. 60, 331 P,3d 867 (2014).

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate two things: "[t]hat the delay is not the fault of the petitioner" and that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. Under the first requirement, "a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.' " Id. The district court determined that there was not good cause to overcome the procedural bar. II AA 376-381

In the FFCOL it is erroneously stated that Defendant did not address the issue of an untimely petition. This is incorrect. On October 13, 2013, Flowers filed a motion requesting appointment of counsel to represent him on post conviction relief. Therein Defendant made it clear and that he intended to pursue post conviction relief and requested appointed counsel. The State opposed the request. A hearing was held on November 13, 2014. Defendant was not present. The court in exercising its discretionary power under NRS 34.750 determined that counsel should be appointed and the matter case was referred to office of appointed counsel. On November 18,

2013. The matter was continued to January 13, 2014, for appointment of counsel. V AA 1141-1144. On that day, undersigned accepted the appointment. V AA 952-954. The petition was filed two days later on January 15, 2014.

NRS 34.750 states in pertinent part as follows:

> Appointment of counsel for indigents; pleadings supplemental to petition; response to motion to dismiss.
> 1. A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
> (a) The issues presented are difficult;
> (b) The petitioner is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

The court determined that counsel should be appointed on November 18, 2013 Counsel was not confirmed until January 13, 2014. At that same time, the State stated that the one-year time period in which to file a post-conviction habeas petition had lapsed. The district court stated that the matter had been continued for appointment of counsel and declared the matter stayed. The State then reserved the right to assert any applicable procedural bars should Defendant file a post-conviction habeas petition. On January 15, 2014, through counsel, Defendant filed his Petition for Writ of Habeas Corpus (Post-Conviction). The State filed its Response and Motion to Dismiss on February 14, 2014. On February 12, 2016, Defendant filed the Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). The State's Response was filed on March 24, 2016. Therein the State argued that the petition was

procedurally barred. Defendant addressed that argument in the Defendant filed a Reply on May 2, 2016.

The district court determined that counsel should be appointed. There was a lag in time between the court determining that counsel should be appointed and counsel accepting the appointment. This was not a delay which can be attributed to Defendant. Consequently, Defendant has shown good cause sufficient to overcome the procedural bar.

Even though Defendant has proven he has good cause to overcome the procedural bar, he must still show prejudice. Actual prejudice requires a petitioner to show error that caused him actual and substantial disadvantage. Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). As discussed herein above, Defendatn has valid claims on which he should prevail. He was prejudiced by counsel's failure to raise them previously.

5. THE DISCOVERY SHOULD HAVE BEEN PERMITTED IN REGARD TO THE ALLEGED BRADY VIOLATION

In the district court, Defendant asserted that disgraced former LVMPD crime lab technician Kristina Paulette was involved in the DNA forensic examination of evidence in the case. She was fired after she was caught covering up a mistake made during the process of analyzing DNA. V AA 964. Defendant requested permission to conduct discovery in regard to Paulette's involvement in the instant matter. That Paullette was disgraced and fired for improprieties was not disputed by the State

whose only response was that Defendant was not entitled to conduct discovery pursuant to NRS 34.780 which states as follows.

> 1. The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with NRS 34.360 to 34.830, inclusive, apply to proceedings pursuant to NRS 34.720 to 34.830, inclusive.
> 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.
> 3. A request for discovery which is available under the Nevada Rules of Civil Procedure must be accompanied by a statement of the interrogatories or requests for admission and a list of any documents sought to be produced.

Defendant asserted that if there were issues with Paulette's involvement in the instant matter which were not disclosed pre-plea, the state committed a Brady violation. The State never addressed the concerned about Paulette directly. This failure this should be considered to be a confession of error. Polk v. State, 126 Nev. Adv. Op. No. 19 (Nev. 2010)

United States v. Brady 373 U.S. 83 (1963) and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. "[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. To raise a claim in an untimely and/or successive post-conviction habeas petition, the petitioner has the burden of pleading and proving specific facts that demonstrate good cause and prejudice to overcome the procedural bars. Good cause

and prejudice parallel the second and third Brady components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.

The State is required under Brady v. Maryland, 373 U.S. 83 (1963) to disclose material exculpatory evidence within its possession to the defense before the entry of a guilty plea; a defendant may challenge the validity of the guilty on the basis of the State's failure to make the required disclosure, but to succeed, the defendant must demonstrate the three components of a Brady violation in the context of a guilty plea; as to the materiality component, the test is whether there is a reasonable probability that but for the State's failure to disclose the evidence the defendant would have refused to plead guilty and would have gone to trial. State v. Huebler, 128 Nev. Adv. Op 19 (2012). Additionally, failure to turn over exculpatory evidence is good cause for an untimely petition.

Under the circumstances, the district court erred in not permitting Defendant to conduct discovery on this issue.

VI. CONCLUSION

It is respectfully requested that this Court reverse the order of the district court denying Defendant's request for post conviction relief, or, in the alternative, that the case be remanded to the district court for an evidentiary hearing on the merits.

DATED this 28th day of February 2017.

s/ Karen A. Connolly
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CERTIFICATE OF RULE 28.2 COMPLIANCE

1. I hereby certify that this Appellant's Opening Brief complies with the formatting requirements of NRAP 32(a)(4)-(6) because:

[XX] This Appellant's Opening Brief has been prepared in a proportionally spaced typeface using WordPerfect X8 in 14 point-Times New Roman, double-spaced, on 8 ½ by 11-inch paper with 1 inch margins on all sides and consecutively numbered at the bottom.

2. I further certify that this Appellant's Opening Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is:

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 6,810 words.

3. Finally, I recognize that pursuant to NRAP 3C, I am responsible for filing a timely Appellant's Opening Brief and that the Supreme Court of Nevada may sanction any attorney for failing to file a timely Appellant's Opening Brief, or failing to raise material issues or arguments in the Appellant's Opening Brief, or failing to cooperate fully with appellate counsel during the course of the appeal. I therefore certify that the information provided in this Appellant's Opening Brief is true and

complete to the best of my knowledge, information and belief.

DATED this 28th day of February, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of KAREN A. CONNOLLY, LTD., and on the 28th day of February 2017, I served a true and correct copy of the above and foregoing ***Appellant's Opening Brief*** pursuant to NRCP 5 by the method or methods indicated below:

☒ by depositing the same in the U.S. Mail, First Class Mail, with postage fully prepaid, at Las Vegas, Nevada, addressed as follows:

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/s/ Shaeley Pilayo
An Employee of KAREN A. CONNOLLY, LTD.

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS, A/K/A NORMAN HAROLD FLOWERS, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70933

FILED

JUL 12 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

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

Appellant Norman Flowers' January 15, 2014, petition was untimely filed because it was filed 6 days after the one-year deadline imposed by NRS 34.726(1). To demonstrate good cause to excuse the untimely petition, Flowers had to demonstrate that the delay was not his fault and that dismissal of the petition as untimely would unduly prejudice him. *See* NRS 34.726(1)(a), (b). The district court determined that Flowers had not made the necessary showing.[1] We disagree.

As to the first requirement, Flowers had to demonstrate that an impediment external to the defense prevented him from complying with the procedural requirements. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). An impediment external to the defense may be

[1]The district court also found that Flowers had not addressed the procedural time bar in his supplemental petition. However, we note that Flowers addressed the procedural time bar in his reply and at the hearing.

shown when the factual or legal basis for a claim was not reasonably available to be presented in a timely petition or when some interference by officials made compliance impracticable. *Id.*

The latter circumstance, official interference, is implicated in this case. Flowers asserts that the petition was filed 2 days after postconviction counsel confirmed that she would represent Flowers and that the district court had previously informed counsel she had 60 days to review the case file before confirming. The district court's actions in granting the request for the appointment of counsel before Flowers had filed a petition and seemingly extending the filing deadline interfered with the timely filing of the petition. Appointment of counsel through NRS 34.750(1) requires the filing of a petition, and the district court's decision to grant a request for counsel without first requiring the filing of a petition was in error.[2] This error was compounded when at the hearing in November, which was approximately 6 weeks before the deadline to file, the district court informed counsel she could have 60 days to review the file before deciding whether to confirm as counsel. The 60-day period necessarily meant that any petition filed by counsel would be untimely. And the district court's statements at the November hearing ensured that no petition would be filed before the statutory one-year deadline. Under these circumstances, we conclude that Flowers had demonstrated that the 6-day-delay was not his fault but instead was attributable to an impediment external to the defense.

[2]We note that the district court was twice informed that no petition had been filed.

We further conclude that the district court erred in concluding that Flowers failed to demonstrate that he would be unduly prejudiced if the petition was dismissed as untimely. In this respect, we primarily are concerned with Flowers' claim that his trial and appellate counsel should have argued that the district court improperly coerced him into pleading guilty[3] in violation of *Cripps v. State*, 122 Nev. 764, 137 P.3d 1187 (2006). Flowers, who was facing the death penalty for the murder and sexual assault of two victims, points to the district court's comments during a hearing before he decided to plead guilty. At that time, the district court indicated that Flowers would not receive a better offer and that no further plea negotiations would be allowed after the hearing. Flowers alleges that the district court's statements were material to his decision to enter a guilty plea and that but for those statements, he would not have entered a guilty plea. He argues that trial and appellate counsel should have challenged the guilty plea on that basis.

The district court concluded that this claim had previously been considered and rejected on direct appeal. We disagree. We acknowledge that the language in our decision on direct appeal regarding the district court's statements was confusing and made it appear as if a *Cripps* violation had been considered. However, Flowers never raised a *Cripps* violation in his presentence motion to withdraw the guilty plea or the direct appeal that followed. The context of the statement from the decision on direct appeal was in reference to the claim that trial counsel had coerced the guilty plea. Thus, the alleged *Cripps* violation was not

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[3]Flowers entered his plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

considered on direct appeal and may be raised under the umbrella of ineffective assistance of counsel.

The district court also concluded that the claim lacked merit because the comments at issue were only intended to create a record to ensure Flowers understood he was facing the death penalty if he proceeded to trial and that trial was to proceed on the next judicial calendar day. Based upon our review of the record on appeal, we cannot agree with the district court's assessment. The record shows that the district court's statements about the plea negotiations were not simply informative as they included a statement fairly characterized as endorsing the plea offer, "There is no chance that you're going to get a better offer than today," and several statements that no plea negotiations would occur after the hearing, "No deals once I leave this room," "There won't be another negotiation. Do you understand? No chance," and "And once we walk out the door, there's no negotiation, we're going to trial." These statements violated *Cripps'* bright-line rule precluding judges from participating in the "formulation or discussions of a potential plea agreement."[4] 122 Nev. at 770, 137 P.3d at 1191. And the statements may reasonably be viewed as having been a material factor affecting Flowers' decision to plead guilty considering his decision not to accept the negotiations before the district court's statements and the filing of a presentence motion to withdraw the guilty plea days later. *See id.* at 771, 137 P.3d at 1192 (indicating that improper judicial participation in plea negotiations may be harmless depending on whether the participation

[4]There is an exception to this bright-line rule, but it is not applicable in this case.

"may reasonably be viewed as having been a material factor affecting the defendant's decision to plead guilty"). Based on this record, the ineffective-assistance claim may have merit. See *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Flowers therefore has made a sufficient showing of prejudice for purposes of NRS 34.726(1)(b). As such, the district court erred in denying the petition as untimely.[5] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[6]

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

cc: Hon. Elizabeth Gonzalez, Chief Judge
Hon. Douglas Smith, District Judge
Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[5]In light of our disposition, we decline to consider the parties' remaining contentions, and we deny the motion to consolidate.

[6]In light of the comments made by the district court, we direct that this case be reassigned to another district court judge.