IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH HENDERSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 62629

Appeal from an Order Denying
Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Abbi Silver, District Judge
District Court No. C-05-212968-1

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 pursuant to that rule. These representations are made so that the justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant: Julian Gregory, Esq.
2. Publicly-held Companies Associated: None
3. Law Firm(s) Appearing in the Court(s) Below:
    a. The Kice Law Group, LLC.
    b. Clark County Public Defender

DATED this 16 of October, 2013.

/s/ Julian Gregory

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JURISDICTIONAL STATEMENT

This is an appeal a Findings of Fact, Conclusions of Law and Order filed on November 21, 2012, in the Eighth Judicial District Court, Clark County, Nevada, by the Honorable Abbi Silver. This Court has jurisdiction to hear this appeal pursuant to NRS 34.575(1) and NRAP 22, which provide that the Nevada Supreme Court may hear appeals of the district court's denial of a petition for a writ of habeas corpus.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in denying Mr. Henderson excess funds for a DNA expert.

II. Whether the district court erred when it revealed to a testifying witness components of another witness's testimony.

III. Whether the district court erred in denying Mr. Henderson's claims of ineffective assistance of counsel based on counsels' failures to retest the DNA and to preserve the record at trial.

IV. Whether the district court erred in denying Mr. Henderson's *Brady v. Maryland* claim as procedurally barred.

STATEMENT OF FACTS

Eric Bernzweig and his fiancée, Julie Kim, were in bed in the early morning hours of September 3, 2004, when their doorbell rang. (1 Appellant's Appendix [AA] 3.) Mr. Bernzweig went downstairs to answer the door. (*Id.*) The man at the door told Mr. Bernzweig that he had thrown his keys into Mr. Bernzweig's backyard. (*Id.*) The masked assailants then en-

tered the residence with guns equipped with laser sights. (*Id.*) Upon entry, the men made repeated demands for access to a safe. (*Id.*) Two of the assailants took Mr. Bernzweig upstairs while the third man, who wore a mask, bound Ms. Kim. (*Id.*) This man then began touching Ms. Kim's breasts and buttocks. (*Id.* at 3-4.)

The masked assailant digitally penetrated Ms. Kim and eventually placed his penis in her vagina. (*Id.* at 4.) The assailant then took Ms. Kim upstairs where he again sexually assaulted her. (*Id.*) After all of the assailants left, Ms. Kim was able to free herself and Mr. Bernzweig and they called 911. (*Id.*)

Ms. Kim went to University Medical Center where a Sexual Assault Nurse Examiner (SANE) collected DNA samples of an unknown subject from Ms. Kim's vagina, breast, and bed sheet. (*Id.*) Investigators uploaded that DNA sample into the national Combined DNA Index System (CODIS) for comparison. (*Id.*) A CODIS "hit" came back from California and the DNA was linked to Appellant Joseph Henderson. (*Id.*) Based on these findings, the State charged Mr. Henderson with fourteen criminal counts. (*Id.* at 8-13.)

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STATEMENT OF THE CASE

Mr. Henderson was charged by way of Information with conspiracy to commit burglary, burglary while in possession of a firearm, conspiracy to commit first degree kidnapping, first degree kidnapping with use of a deadly weapon, conspiracy to commit sexual assault, three counts of sexual assault with use of a deadly weapon, conspiracy to commit robbery, two counts of robbery with use of a deadly weapon, open or gross lewdness, and battery with use of a deadly weapon resulting in substantial bodily harm. (*Id.*) This case went to trial before the Honorable Donald Mosley from June 23, 2008, to June 27, 2008. (2 AA 169-70.) Following trial, the jury returned a verdict of guilty on all counts, and Mr. Henderson was sentenced as follows:

> (1) conspiracy to commit burglary, 12 months;
>
> (2) burglary with use of a deadly weapon, 62 to 156 months, to run concurrent to count 1;
>
> (3) conspiracy to commit first degree kidnapping, 24 to 60 months, to run consecutive to count 2;
>
> (4) first degree kidnapping with use of a deadly weapon, life with the possibility of parole after 60 months a with consecutive sentence of life with the possibility of parole after 60 months, to run consecutive to count 3;

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(5) first degree kidnapping with use of a deadly weapon, , life with the possibility of parole after 60 months a with consecutive sentence of life with the possibility of parole after 60 months, to run consecutive to count 4;

(6) conspiracy to commit sexual assault, 24 to 60 months, consecutive to count 5;

(7) sexual assault with use of a deadly weapon, life with the possibility of parole after 120 months a with consecutive sentence of life with the possibility of parole after 120 months, to run consecutive to count 6;

(8) sexual assault with use of a deadly weapon, life with the possibility of parole after 120 months a with consecutive sentence of life with the possibility of parole after 120 months, to run consecutive to count 7;

(9) sexual assault with use of a deadly weapon, life with the possibility of parole after 120 months a with consecutive sentence of life with the possibility of parole after 120 months, to run consecutive to count 8;

(10) conspiracy to commit robbery, 24 to 60 months, to run consecutive to count 9;

(11) robbery with use of a deadly weapon, 72 to 180 months with a consecutive 72 to 180 months, to run concurrent to count 10;

(12) robbery with use of a deadly weapon, 72 to 180 months plus a consecutive 72 to 180 months, to run consecutive to count 11;

(13) open and gross lewdness, 12 months, to run concurrent to count 12; and

> (14) battery with use of a deadly weapon resulting in substantial bodily harm, 62 to 156 months, to run consecutive to count 13.

(1 AA 36-39, 42-47.)

Mr. Henderson appealed his conviction, and filed his Opening Brief on April 1, 2009. (*Id.* at 48.) Mr. Henderson presented the following issues:

> I. Joseph Henderson was prejudiced by the government's consumption of the DNA material. As a result, he could not retest the DNA material to show the inadequacy of the government's conclusions concerning DNA evidence.
>
> II. After denying the defense motion to dismiss, the court failed to afford Mr. Henderson alternative relief sought by the defense and thereby violated his right to due process.
>
> III. Mr. Henderson's right to due process was violated when the court denied defense [sic] motion for a mistrial after the testimony of Kim Murga.
>
> IV. Mr. Henderson was denied a fair trial when the jury pool was tainted by the fact that the district court denied the defense request not to voice peremptory challenges in open court.

(*Id.*) This Court filed its Order of Affirmance on February 3, 2010, (*id.* at 102-04), and remittitur issued on March 11, 2010, (*id.* at 105-06).

Mr. Henderson filed his proper person petition on January 11, 2011, (2 AA 1), and Stephanie Kice was appointed to represent Mr. Henderson on March 17, 2011, (*id.* at 35-36). Mr. Henderson filed his Amended Petition

on August 26, 2011. (*Id.* at 37.) The district court conducted an evidentiary hearing on October 22, 2012, after which it denied Mr. Henderson's petition. (*Id.* at 68, 109.) The State prepared, and the court adopted, a Findings of Fact, Conclusions of Law and Order filed on November 21, 2012. (*Id.* at 130.) Mr. Henderson filed his proper person Notice of Appeal on February 12, 2012, (*id.* at 146), and this Court remanded this case for the appointment of counsel, (*id.* at 157). The undersigned counsel was appointed to represent Mr. Henderson on March 14, 2013. (*Id.* at 158-59.) This appeal follows.

SUMMARY OF THE ARGUMENT

The district court appointed counsel to represent Mr. Henderson in his petition for post-conviction relief, and then denied habeas counsel the funds to adequately investigate his underlying claims, constituting an abuse of discretion. The district court permitted habeas counsel to invoke the "exclusionary rule" under NRS 50.155, and then violated its own order by disclosing to a testifying witness what the prior witness had said on the stand, creating a presumption of prejudice. The district court then categorically denied Mr. Henderson's claims. Rather than giving Mr. Henderson a full and fair opportunity to seek post-conviction relief, the district court instead persisted with the illusion of legitimacy without ever intending to

genuinely weigh the claims presented. The district court's denial of Mr. Henderson's petition should be reversed and this case remanded with instructions to issue a writ of habeas corpus, or in the alternative, remanded with instructions to appoint an expert and hold an evidentiary hearing.

ARGUMENT ON THE ISSUES

I. The District Court Erred in Denying Mr. Henderson Excess Funds for a DNA Expert.

Following the appointment of counsel in the district court for the purposes of amending Mr. Henderson's proper person petition, habeas counsel requested that the district court authorize the expenditure of funds for a DNA expert to assess the evidence and lend weight to Mr. Henderson's claims of ineffective assistance of counsel. (2 AA 66-67); *see also infra* section III. The district court denied habeas counsel's request, noting that Mr. Henderson had already been given the assistance of a DNA expert at trial. (2 AA 67.) That denial served to deprive Mr. Henderson of his rights to effective assistance of counsel and due process.

A. Standard of Review

The district court has discretion whether to appoint counsel in post-conviction petitions, and accordingly, has the discretion whether to approve excess funds for investigatory or other expert assistance. *Kirksey v. State*,

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112 Nev. 980, 1003, 923 P.2d 1102, 1116-17 (1996). Accordingly, a district court's decision in that regard is reviewed for an abuse of discretion. *Id.*

B. Analysis

Despite the fact that the district court saw enough merit to Mr. Henderson's petition to appoint counsel to supplement that petition, the district court denied Mr. Henderson's counsel the opportunity to meaningfully do so. Mr. Henderson did raise the issue of trial counsels' failure to seek retesting of the DNA evidence in his proper person petition. (2 AA 21.)

Although there is no general constitutional right to appeal or to collateral review, when a State so provides one, it must still act in accordance with due process. *See Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985). Although Mr. Henderson is indigent, he is still entitled to the assistance of experts. *See Ake v. Oklahoma*, 470 U.S. 68, 84 (1985). The district court, and now this Court, saw fit to appoint counsel to represent Mr. Henderson; the denial of habeas counsel's request for expert assistance rendered Mr. Henderson's amended petition and subsequent evidentiary hearing an exercise in futility and amounted to an abuse of the district court's discretion, as well as a violation of Mr. Henderson's right to the effective assistance of counsel and to due process. *See* U.S. Const. amends. V, VI.

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C. Conclusion

The State has provided Mr. Henderson with the right to collateral review of his conviction. For the district court to appoint counsel, then deny counsel the funds necessary to fully investigate Mr. Henderson's claims of constitutional error, amounts to an abuse of discretion. For that reason, this Court should reverse the decision of the lower court, or in the alternative, remand this case for the appointment of a DNA expert and evidentiary hearing.

II. The District Court Erred When it Revealed to a Testifying Witness Components of Another Witness's Testimony, Creating a Presumption of Prejudice and Necessitating Reversal.

At the beginning of the evidentiary hearing, below, Mr. Henderson's counsel invoked the "exclusionary rule." (2 AA 68.) The exclusionary rule is a provision of Nevada law that provides for the exclusion and sequestration of witnesses during hearings and trials either at the request of a party or *sua sponte*. NRS 50.155. There is an analogue to NRS 50.155 in Federal Rule of Evidence 615. As Mr. Henderson's counsel called Norm Reed to testify first, the district court excused Violet Radosta from the courtroom. (2 AA 68.) When Ms. Radosta was then called to testify, and her testimony contradicted that of Mr. Reed, the district court informed Ms. Radosta of that fact and gave her the opportunity to revise her testimony. (*Id.* at 91.)

Doing so constituted error in that it violated Nevada law and tainted a pending witness's testimony.

A. Standard of Review

The mandatory language of NRS 50.155 imposes a duty on the trial court to impose the exclusionary rule at the request of any party. Generally, the decision whether to exclude or sequester witnesses falls within the discretion of the trial court. *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912, 915 (9th Cir. 2005) (interpreting FRE 615). This Court has held, however, that it would be unduly harsh to require an invoking party to prove actual prejudice from the lower court's exercise of discretion because any prejudice would be "virtually impossible to detect." *Givens v. State*, 99 Nev. 50, 55, 657 P.2d 97, 100 (1983), *overruled on other grounds by Talancon v. State*, 102 Nev. 294, 721 P.2d 764 (1986). This court will therefore presume prejudice when the exclusionary rule is violated. *Givens*, 99 Nev. at 55, 657 P.2d at 100 (*relying on State v. Roberts*, 612 P.2d 1055 (Ariz. 1980); *Reynolds v. State*, 497 S.W.2d 275 (Ark. 1973)); *see also United States v. Brewer*, 947 F.2d 404, 411 (9th Cir. 1991) (interpreting FRE 615 and noting that, when a court fails to comply with the exclusionary rule, "prejudice is presumed and reversal is required unless it is manifestly clear

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from the record that the error was harmless or unless the prosecution proves harmless error by a preponderance of the evidence").

B. Analysis

In *Givens v. State*, this Court noted that the purpose behind the exclusionary rule and sequestration of witnesses is to prevent witnesses from shaping their own testimony in response to others', thereby preserving and exposing inconsistencies in testimony. *Givens*, 99 Nev. at 55, 657 P.2d at 100 A presumption of prejudice attaches when a district court declines to enforce the exclusionary rule. *See id.*; *Brewer*, 947 F.2d at 411.

In this case, the district court applied the exclusionary rule on counsel's request, directing Ms. Radosta to exit the courtroom while Mr. Reed testified. (2 AA 68.) The district court then nullified any benefit from that invocation when it provided Ms. Radosta with an explanation of how her testimony conflicted with Mr. Reed's:

> Q. But as you testify today, it's your understanding that all of the samples taken from the crime scene, forensic crime scene – forensic samples taken from the crime scene have been consumed in their entirety?
>
> A. Yes. Which I know the crime lab tries to avoid doing. So I'm not – I don't remember if they gave us a reason why. It was entirely used because they, they try not to do that for this exact reason so that if the defense wants to retest, we can.

> Q. Okay. And had that motion been granted, what would your strategy have been at that point in time?
>
> A. Which motion?
>
> Q. The motion to retest the DNA.
>
> THE COURT: Let me get this straight. Did Judge Mosley actually do that before we're going down this ground? Because that's opposite of what Norm Reed just said.

(*Id.* at 91.) The district court then launched into a pages-long argument with counsel about the discrepancies between Ms. Radosta's testimony – with her on the stand – and Mr. Reed's prior testimony.

> THE COURT: So before we go into if and da-da-da, did Judge Mosley deny a motion? She's saying she remembers it, but that's, you know.
>
> THE WITNESS: Well, he couldn't order retesting.
>
> . . . .
>
> THE COURT: Okay. It says here, and I don't know, I'm not sure, it says that Henderson claims that the district court erred by denying his motion to dismiss the information and alternative motion to preclude the State's DNA evidence based on the State's alleged consumption of all the available DNA material because Henderson's claim that the State did not preserve DNA material from each sample for defense retesting is belied by the record. We conclude that the district court did not abuse its discretion.
>
> That makes it sound like there's a sample out there.

MS. KICE: Okay.

THE COURT: So I don't want this record to be filled with facts that are just not what happened at trial.

MS. KICE: I'm not trying –

THE COURT: And I don't know, I wasn't the trial judge. For me, you know, we're paperless. For me to click on – I mean, it's incredible. If I can just look at the minutes, I could figure it out, but I have to literally click on. I have no idea what happened because each page only has like 10 events. So for me to go back to 2006 is like a 20 minute ordeal. So maybe –

MS. KICE: I understand, Your Honor. I wasn't trying to lay the water. We just got two different answers. That's why I was asking for clarity. [sic]

THE COURT: You need to go back then. Because she just said that there was no DNA left and that's why she made the – she made the argument. That's not what, that's not what Mr. Reed said. So you need to go back and clarify this record.

BY MS. KICE:

Q. Would it be – now that you've heard this information, is it possible that there are still extractions or samples that are left to test?

A. I, I – my, my recollection is that there, there was nothing left for us to retest.

The only reason why we would not have, had there been a sample to retest, the only reason why we would not have retested, there's, there's two reasons. One, there's no sample to retest; or two,

because our expert tells us you don't want to retest it, that's not gonna help you at all. Those are the only times we don't retest if there's a sample.

If our ex— if there's a sample there and our expert says go retest it, we go retest it. We, we file a motion on the court and ask to have it retested.

. . . .

Q. At the minutes from a hearing on June 17th, 2008, you could read right there.

THE COURT: June what?

MS. KICE: 17th, 2008, Your Honor.

THE WITNESS: Right. And I mean, I'm not sure what Mr. Reed testified to, but I'm reading this again. And what it's saying to me is that we didn't have the ability to retest.

BY MS. KICE:

Q. Okay. And that's because you couldn't retest extractions?

A. That's – yeah, that there wasn't enough there to retest.

Q. Okay.

A. That's my understanding that we did not have the option to retest.

Q. Okay.

A. And I mean, that's my recollection.

. . . .

THE COURT: I'm trying to get the order. I mean, I'm reading something. Let me read this for a second because I'm trying to figure out the chronology of what happened based on – and let me ask you this: Do you have an order on the denial of the July 17th, '08 transcript that you're making this motion on?

Because what I see is that the trial actually begins on July 20 – or excuse me. June 23rd of '08. This motion was brought, it looks like, on the eve perhaps calendar call on June 17th, of '08 to protest.

So I was wondering if there was a formal order denying. No? Okay.

. . . .

THE COURT: Because what – I mean, how it's proceeded, since I'm a blank slate up here, it's disjointed. And so if the supreme – if it's disjointed to me, it'd be disjointed, this record, to the supreme court. [sic]

So I want it to be clear of the chronology of what actually happened on the retesting since that's his issue.

But let me continue to read this, so I get a good chronology. Okay. So let me see.

Well, correct me if I'm wrong, Ms. Kice, I've now looked at the testimony and the defense was ready for trial. And what we're talking about on June 17th, there was an issue of retesting. The State's opposition says that there's clearly enough to retest.

Now, I know that it's been five more years that Ms. Radosta comes up here cold to start testifying, but it appears here, and now the Nevada supreme court, that everything I'm seeing, there was enough to retest and that on the eve of trial, you know, originally they wanted to retest it, then we withdrew it, on the eve of trial Mr. Reed brings it up about retesting, and then at the end of the day it appears

that Judge Mosley found that there was enough to retest and denied any motion as far as to dismiss for destruction of evidence. And Mr. Norm Reed then said hey, we're ready for trial.

I mean, that's how I read it.

MS. KICE: Okay.

THE COURT: Okay. So the problem is the impression that Ms. Radosta says I don't remember that because apparently they didn't think that there was enough.

MS. KICE: Okay.

THE COURT: At least one point.

MS. KICE: Correct.

THE COURT: But at some point they decide to go forward and—

MS. KICE: Without retesting.

THE COURT: Without retesting and it appears that the State said that there was enough to retest and the Court found that there was enough to retest.

MS. KICE: Correct. And so my question continued to be why didn't they have the material retested.

THE COURT: Well, then that's really a misstatement of the record because it does appear that there was enough to retest it.

MS. KICE: Okay. I'll get back. I was just gonna get my paper.

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THE COURT: Maybe you need Ms. Radosta to relook at this. It – I mean, the problem is she says she doesn't remember. She believes that there was enough to retest but they made a motion to dismiss.

MS. KICE: Right. And Mr. Reed—

THE COURT: So then you continue on with the record of Judge Mosley denied it. Everything is belied by the record of what just – of what just went on here.

MS. KICE: Okay.

THE COURT: So I don't want this record to be wrong.

MS. KICE: Okay. I don't want it to be wrong either.

THE COURT: So sometimes attorneys have a – they don't have a good memory of what happened because she's partially right, she did make a motion, she's partially right, Mosley did deny it, but she's incorrect because it appears that there was enough to retest and that they just said ready for trial.

That's what I'm reading. And correct me if I'm wrong, either side.

MS. KICE: I'm not gonna correct Your Honor.

THE COURT: Is that correct?

MS. KICE: I believe that is correct.

THE COURT: Is that correct?

MS. CLOWERS: Yes, Your Honor.

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THE COURT: Is this what the Nevada supreme court says? [sic]

MS. KICE: Yes, Your Honor.

THE COURT: Then let's go with that. Let's go with okay, even if there was enough to retest, which clearly now it shows that there was enough to retest, why didn't you retest. Let's go that route. Because I don't want to go through a route that isn't what happened.

MS. KICE: Okay. I don't—

THE COURT: Does that make sense?

MS. KICE: Absolutely. I don't know that that's what I was attempting to do.

. . . .

THE COURT: . . . But what I heard was completely the wrong line of questioning based on what really happened. So I just want the record to be clear. Because whoever reads this again, no matter what way I go on this case, it's going to the supreme's, they're gonna read a transcript, and I don't want what really happened to be wrong. [sic]

MS. KICE: And neither do I, Your Honor.

THE COURT: Okay. So—

MS. KICE: And I'll take Ms. Clowers' order back to—

THE COURT: Let's just go with again, there was enough to retest.

MS. KICE: Okay.

THE COURT: Why didn't she retest it then, what was her reasoning for saying ready for trial.

MS. KICE: Okay.

THE COURT: Because that's what I just read. Norm Reed said ready for trial.

MS. KICE: Okay. So she didn't give it to me. She kept it.

THE COURT: Oh, I'm sorry.

MS. CLOWERS: Your Honor, may I—

BY MS. KICE:

Q. Why wasn't the material retested?

. . . .

THE WITNESS: From what I recall, there were – and if, if I'm misremembering the facts of this case, please correct me.

THE COURT: And maybe I should just clarify because if, if – you know, if there's a big difference between ineffective assistance of counsel proceeding on a case in which they should have moved to retest versus there is enough to retest.

MS. KICE: Exactly.

THE COURT: And what I just heard Mr. Reed testify to.

MS. KICE: Correct.

THE COURT: So I just want to make sure we're all on the same page. Okay, go ahead.

> THE WITNESS: From what I recall on this particular case, there were two samples that came back as a match to my client.
>
> There was a sample on the breast and then there was a vaginal swab both of which came back as a match. We were able to make a good cross-examination out of the vaginal swab. The breast swab on the other hand, there was no mixture, it was just a match to Mr. Henderson.
>
> Based on that breast swab and our conversations with our experts, it was not in his best interest to have the – either swab retested. Because even if the vaginal swab came back as not him or issues with him, they were still able to rely on the breast swab which was a 100 percent non-mixture match to Mr. Henderson. That's what I recall. . . .

(Transcript 91-94.) Rather than permitting counsel to proceed with her examination of Ms. Radosta, the district court proceeded to provide enough information from Mr. Reed's prior testimony to radically alter Ms. Radosta's testimony from one answer – there wasn't enough DNA to retest – to another – it was a strategic decision not to retest. This is precisely the result that the exclusionary rule is meant to avoid. *Givens*, 99 Nev. at 55, 657 P.2d at 100

C. Conclusion

Had counsel been given an opportunity to fully develop Ms. Radosta's testimony and to highlight the discrepancies therein, Mr. Henderson would have been able to establish that trial counsels' failure to retest the DNA in his case was not due to any learned strategy. With that established, Mr.

Henderson could have then shown that this resulted in prejudice to his case. Instead, the district court interjected itself into Ms. Radosta's examination so thoroughly that it absolutely nullified the invocation of the exclusionary rule and tainted Ms. Radosta's testimony with information gleaned from Mr. Reed's.

Because the district court violated NRS 50.155, this Court should presume that Mr. Henderson was prejudiced in the hearing below. Based on that prejudice, Mr. Henderson would ask this Court to reverse the decision of the lower court and instead conclude that Mr. Henderson's trial counsel was ineffective and that ineffectiveness constituted a deprivation of Mr. Henderson's Sixth Amendment right to counsel.

III. The District Court Erred in Denying Mr. Henderson's Claims of Ineffective Assistance of Counsel Because Trial Counsels' Performance Fell Beneath an Objective Standard of Reasonableness.

Mr. Henderson's trial counsel was ineffective. To establish a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was beneath "an objective standard of reasonableness," and (2) that, but for counsel's deficiency, a different result would have been had at trial. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Rubio v. State*, 124 Nev. 1032, 1039-40, 194 P.3d 1224, 1229 (2008). A reasonable

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probability is one that undermines confidence in the outcome. *Strickland*, 466 U.S. at 694.

A. Standard of Review

A post-conviction petition for writ of habeas corpus constitutes a mixed question of law and fact; accordingly, the factual findings of the lower court are given deference, but the lower court's application of the law to those facts is reviewed de novo. *State v. Huebler*, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012) (relying on *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002); *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005)).

B. Analysis

"Effectiveness" means performance "within the range of competence demanded of attorneys in criminal cases." *Jackson v. Warden*, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Effectiveness encompasses making "sufficient inquiry into the information that is pertinent" to the case to make "a reasonable strategy decision on how to proceed with his client's case." *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (citing *Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2065-67). A deprivation of the right to effective assistance of counsel constitutes a violation of the Sixth and Fourteenth Amendments to the United States Constitution, and article I, sections three, six, and eight of the Nevada Constitution.

1. Trial Counsels' Failure to Retest the DNA Constituted Ineffective Assistance of Counsel.

As noted above, DNA was a central issue in Mr. Henderson's trial. Despite this, trial counsel failed to fully investigate the DNA in this case. There are a number of factors that can increase the rate of false-positives in DNA testing including the quantity of DNA tested, how the samples are smeared, how often the lab implements quality assurance measures and whether the lab is accredited, technician error in mislabeling or mishandling the DNA, carry over or contamination issues, lab errors, issues of kinship, coincidence, and the failure to isolate certain subgroups in a population. Again, without a thorough examination of the State's evidence, grave concerns exist about the DNA collection, testing, and results.

Despite the fact that Mr. Henderson was indigent and represented by the public defender's office, he was still entitled to the assistance of experts. *See Ake v. Oklahoma*, 470 U.S. 68, 84 (1985). Because counsel failed to secure expert assistance, Mr. Henderson was significantly prejudiced and effectively deprived of counsel in a critical stage of the proceeding in violation of his constitutional rights to the effective assistance of counsel and due process of law. U.S. Const. amends. V, VI.

The trial in this case was continued a number of times. (2 AA 167-69.) As such, ample time existed for Mr. Henderson's prior counsel to ei-

ther send the remaining samples out in order to re-test the DNA or to hire a forensic DNA specialist to review the Metro report and generate an independent review of the methods used.[1]

These investigatory steps were critical in this case, as the identity of the perpetrator was questionable. Neither victim could identify Mr. Henderson, as the assailants wore masks. (1 AA 3.) Ms. Kim's description of her assailants does not match Mr. Henderson: Ms. Kim told officers that the person who raped her was "approximately 5'8'', 210 lbs." (*Id.*) According to the Nevada Department of Corrections, Mr. Henderson is six feet tall, weighs two hundred and thirty pounds and he is listed as having a large build. The only thing that could be considered evidence linking Mr. Henderson to the crime is the DNA.

Counsel had no tactical or strategic justification within the range of reasonable competence for their failure to hire expert witnesses in this case. Counsel's failure to gather the necessary expert opinions prevented a jury from hearing any potential problems with the DNA collection or processing in both California and Nevada. Because of counsel's failure to perform at a reasonable level of competence, the jury relied upon evidence that was not

[1] Counsel should have obtained reports that verified the chain of custody from California when Mr. Henderson's DNA was taken and the reports from the lab that developed the DNA profile submitted that profile to CODIS.

fully explored. The decision to proceed to trial absent this minimal amount of investigation should not be accepted by this Court as valid strategy.

2. Trial Counsels' Failure to Preserve the Record at Trial Constituted Ineffective Assistance of Counsel.

Throughout the proceedings against Mr. Henderson, prior counsel failed to secure an adequate record by failing to have a record of the bench conferences.[2] During these unrecorded conferences, the trial judge took material, substantial actions, ranging from everything including ruling on evidentiary matters and establishing courtroom procedure and scheduling. Such proceedings are integral parts of a criminal case in general, and of Mr. Henderson's case in particular.

Trial counsel testified at the evidentiary hearing below that there were numerous bench conferences that were not recorded. (2 AA 63.) Although trial counsel testified that he was usually given an opportunity to make a record later, there can be no legitimate strategic or tactical reason for allowing potential claims to be foreclosed, or even risking such, because of an inadequate record. The fact that there is an inadequate record of these proceedings violates Mr. Henderson's constitutional rights, as well as those of

[2] The trial judge additionally failed to take any other measures to effectuate the public interest in observation and comment on these judicial proceedings. These unrecorded bench conferences are too large in number to list individually, but this problem has been a continuous one with the trial court in question for several years.

the public to free and open proceedings. U.S. Const. amend. VI. The failure to secure an adequate record also violates Mr. Henderson's rights under international law, which guarantees every person a fair and public hearing by a competent, independent, and impartial tribunal.[3]

These constitutional violations were prejudicial per se; no showing of specific prejudice is required in order to obtain relief for a violation of the public trial guarantee. *See United States v. Withers*, 638 F.3d 1055, 1063 (9th Cir. 2010) (citing *Waller v. Georgia*, 467 U.S. 39, 49-50 (1984)). Counsel's failure to secure a complete record substantially and adversely affected Mr. Henderson's constitutional rights.

C. Conclusion

There is an axiom among attorneys: "when you try a case, you try a case for appeal." Any effective defense attorney understands the importance of maintaining and preserving a record before and during trial so that those who come after may ensure that their client's rights are preserved. Trial counsel in this case categorically failed in that regard, both in testing the DNA evidence when there was funding available for it, and in the more literal sense when the trial court refused to record bench conferences. The district court's denial of Mr. Henderson's ineffective assistance

[3] Int'l Covenant on Civ. and Pol. Rights, art. XIV (1966).

claims should be reversed, and this case remanded with instructions for the issuance of a writ of habeas corpus.

IV. The District Court Erred in Denying Mr. Henderson's *Brady v. Maryland* Claim as Procedurally Barred.

In its Order, the district court concluded that Mr. Henderson's claim of wrongfully-withheld exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), was procedurally barred because it was not raised on direct appeal. (Order 5.) The district court erred in that regard, as this Court did have the opportunity to address the issue on direct appeal, and the district court should have reviewed the associated constitutional implications.

A. Standard of Review

When reviewing the procedural propriety of a claim raised in a post-conviction petition, the factual findings of the lower court are given deference, but the lower court's application of the law to those facts is reviewed de novo. *State v. Huebler*, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012) (relying on *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002); *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005)).

B. Analysis

The suppression of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, irre-

spective of the good faith of the prosecution. *See generally Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995). The Nevada Supreme Court is in accord: "it is a violation of due process for the prosecutor to withhold exculpatory evidence, and his motive for doing so is immaterial." *Jimenez v. State*, 112 Nev. 610, 618, 918 P.2d 687, 692 (1996).

Brady sets forth a three prong test to determine if a violation of that rule has occurred, which has been restated and relied upon in a plethora of cases: "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

In his amended petition, Mr. Henderson raised the issue of the dearth of information in the file as to the manner in which the DNA sample that caused the "hit" in the CODIS database. There was no indication that the State made any attempt to verify the chain of custody in California or the procedures used by the California lab that placed the sample allegedly belonging to Mr. Henderson into the federal database. This claim dovetails with a claim raised in Mr. Henderson's Opening Brief on direct appeal, where he raised a claim that the State's DNA expert "Ms. Murga used notes in her testimony that had not been previously provided to the defense,

thereby violating Brady v. Maryland [sic] and discovery rules." (AOB 9-12.) This issue was thus properly raised and improperly barred as untimely.

The State never turned over this evidence. The motivation behind that failure is irrelevant. Mr. Henderson was prejudiced by this failure because he was unable to impeach the chemists at either the preliminary hearing or the trial.

C. Conclusion

The district court misapplied the law to Mr. Henderson's petition when it decided that his claims of constitutional error under *Brady v. Maryland* were procedurally defaulted for failure to raise them on direct appeal. Under an appropriate *de novo* review, this Court should conclude that the district court's error mandates reversal and instead grant Mr. Henderson's *Brady* claim, directing the lower court to issue a writ of habeas corpus.

CONCLUSION

Mr. Henderson respectfully submits that the district court erred. First, it abused its discretion when it denied Mr. Henderson access to additional funds for expert assistance. Second, it erred when it violated the exclusionary provisions of NRS 50.155. Lastly, it erred when it categorically denied Mr. Henderson's petition without regard for the legitimate issues raised.

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Based on the above, Mr. Henderson requests that this Court reverse the decision of the district court and remand this case with instructions to issue a writ of habeas corpus. In the alternative, Mr. Henderson would ask this Court to remand this case for the appointment of a DNA expert and further evidentiary proceedings.

DATED this 16 of October, 2013.

/s/ Julian Gregory

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I certify that I have read this brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief is typed in 14-point Georgia font using Microsoft Word 2010, is 30 pages and 6478 words long, and complies with the typeface and -style requirements of NRAP 32(a)(4)-(6), as well as the page length requirements of NRAP 32(a)(7)(A).

I further certify that, to the best of my knowledge, this brief complies with all applicable Nevada Rules of Appellate Procedure and/or subsequent orders of this Court and with NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by a reference to a page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16 of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2013, I served the foregoing document via the Nevada Supreme Court's eFlex system to the following:

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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

/s/ Julian Gregory	10-16-13
Julian Gregory, Esq.	Date