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 APPENDIX VOL. 1

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CHRONOLOGICAL INDEX OF APPENDIX

Description	Vol.	Pages	Date
Search Warrant Affidavit	1	1-7	04/01/2005
Amended Information	1	8-14	06/23/2008
Transcript: Sentencing	1	15-41	08/28/2008
Judgment of Conviction	1	42-47	09/24/2008
Appellant's Opening Brief (Direct Appeal)	1	48-66	04/01/2009
Respondent's Answering Brief (Direct Appeal)	1	67-91	06/01/2009
Appellant's Reply Brief (Direct Appeal)	1	92-101	06/30/2009
Order of Affirmance (Direct Appeal)	1	102-04	02/03/2010
Remittitur (Direct Appeal)	1	105-06	03/11/2010
Proper Person Petition for Writ of Habeas Corpus	2	1-34	01/11/2011
Minutes: Confirmation of Counsel	2	35-36	03/17/2011
Amended Petition for Writ of Habeas Corpus	2	37-55	08/26/2011
Response to Supplemental Petition	2	56-65	09/30/2011
Minutes: Setting Evidentiary Hearing	2	66-67	03/27/2012
Transcript: Evidentiary Hearing	2	68-129	10/22/2012
Findings of Fact, Conclusions of Law and Order	2	130-45	11/21/2012
Proper Person Second Notice of Appeal	2	146-56	02/12/2013
Order for Limited Remand	2	157	03/04/2013

Minutes: Confirmation of Counsel	2	158-59	03/14/2013
Register of Actions: C-05-212968-1	2	160-73	10/16/2013

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ALPHABETICAL INDEX OF APPENDIX

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Amended Information	1	8-14	06/23/2008
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Appellant's Opening Brief (Direct Appeal)	1	48-66	04/01/2009
Appellant's Reply Brief (Direct Appeal)	1	92-101	06/30/2009
Findings of Fact, Conclusions of Law and Order	2	130-45	11/21/2012
Judgment of Conviction	1	42-47	09/24/2008
Minutes: Confirmation of Counsel	2	35-36	03/17/2011
Minutes: Confirmation of Counsel	2	158-59	03/14/2013
Minutes: Setting Evidentiary Hearing	2	66-67	03/27/2012
Order for Limited Remand	2	157	03/04/2013
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Proper Person Second Notice of Appeal	2	146-56	02/12/2013
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Response to Supplemental Petition	2	56-65	09/30/2011
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Transcript: Evidentiary Hearing	2	68-129	10/22/2012
Transcript: Sentencing	1	15-41	08/28/2008

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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:

Name	**Address**
Steven B. Wolfson, Esq. Steven S. Owens, Esq. Clark County District Attorney's Office	200 Lewis Ave. Las Vegas, NV 89155
Catherine Cortez Masto Nevada Attorney General's Office	100 N. Carson St. Carson City, NV 89701

/s/ Julian Gregory

JULIAN GREGORY, ESQ.
Nevada Bar No. 11978
LAW OFFICE OF GABRIEL L. GRASSO, P.C.
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Las Vegas, NV 89134
(702) 868-8866

Attorneys for Joseph Henderson

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

S.W. 2005 93

SEARCH WARRANT

FILED
APR 1 2 39 PM '05
JUSTICE COURT
LAS VEGAS TOWNSHIP
BY DEPUTY

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

HENDERSON, JOSEPH ALEXANDER [redacted]
ID# 1502730

The State of Nevada, to any Peace Officer in the County of Clark. Proof by Affidavit having been made before me by Detective M. Jeffries, said Affidavit attached hereto and incorporated herein by reference, that there is probable cause to believe that certain property, namely, buccal swab from the person of Henderson, Joseph Alexander, who is presently located at: Clark County Detention Center (CCDC) 330 South Casino Center, Las Vegas, Nevada 89101, and as I am satisfied that there is probable cause to obtain said buccal swab from the person of Henderson, Joseph Alexander for issuance of the Search Warrant. The affidavit not being attached since ordered sealed by the court.

You are hereby commanded to search forthwith said premises for said property, serving this warrant at any time day or night, and if the property there to seize it, prepare a written inventory of the property seized and make a return for me within ten days.

DATED this 17th day of March, 2005.

William D Jansen
Judge
1:25 p.m.

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in Justice Court of Las Vegas Township, in and for the County of Clark, State of Nevada.
By: _____ Deputy
Date 4-1-05

S.W. 2005 93

FILED
APR 1 2 39 PM '05
JUSTICE LAS VEGAS NEVADA
DEPUTY

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

STATE OF NEVADA) HENDERSON, JOSEPH ALEXANDER
)ss: [redacted]
COUNTY OF CLARK) ID # 1502730

M. Jeffries, being first duly sworn deposes and states that he is the Affiant and is a Detective with the Las Vegas Metropolitan Police Department (hereinafter referred to as LVMPD) presently assigned to the Crimes Against Youth & Family, Sexual Assault Detail. That your Affiant has been employed with the LVMPD for the past 8 ½ years and has been assigned to the Crimes Against Youth & Family, Sexual Assault Detail for the past 1 ½ years.

There is probable cause to believe that certain property hereinafter described will be found on the following described person, to-wit:

HENDERSON, JOSEPH ALEXANDER, ID# 1502730, SS# [redacted], DOB: 05-16-1970, RC-B, SX-M, HT-6'0, WT-200, HR-BLK, EY-BRO.

HENDERSON, JOSEPH ALEXANDER can presently be found at CCDC,(Clark County Detention Center) 330 South Casino Center, Las Vegas, Nevada 89101.

Your Affiant believes that the DNA sample sought to be obtained would, when submitted to laboratory analysis, disclose the presence of evidence tending to demonstrate the criminal offenses of Sexual Assault and/or Attempt Sexual Assault in violation of NRS 200.364, 200.366, and 193.330 which has been committed by the Defendant from whom the samples will be drawn.

Search Warrant
HENDERSON, JOSEPH ALEXANDER

In support of your Affiant's assertion to constitute the existence of probable cause, the following facts are offered:

That your Affiant developed the following facts in the course of the investigation of said crime, to-wit:

On September 3rd, 2004 between the hours of 0000 hours and 0125 hours, Eric Bernzweig and Julie Kim became the victims of HOME INVASION, BURGLARY, KIDNAP, SEXUAL ASSAULT, ROBBERY WITH A DEADLY WEAPON, AND BATTERY WITH A DEADLY WEAPON. Bernzweig and Kim were in their bedroom preparing to go to sleep. A white male adult rang the doorbell. Bernzweig answered the door, the unknown male told Bernzweig that his keys had been accidently dropped over his block wall into his backyard. After Bernzweig had looked briefly in his back yard for the keys and was unable to find them he allowed the male to enter his home. During the search for the keys, two other suspects entered the home wearing masks, possessing firearms with laser (red) sights. The two masked suspects were described as black males. All three suspects ordered Bernzweig and Kim to follow their instructions, which included tying up both victims and moving Bernzweig by force up stairs. Suspects asked both victims where the cash and safe were located. One of the masked suspects, described as being the larger of the two black males, approximately 5'8", 210 lbs, began to fondle victim,

Kim over her body. He then exposed her breasts and placed his mouth on her nipple, and proceeded to sexually assault her by penetrating her vagina with his penis. The suspect then moved victim Kim upstairs to the master bedroom, where he proceeded to sexually assault her again penetrating her vagina with his penis while tied up. Bernzweig had tried to untie himself in an attempt to escape and check on Kim's welfare as they had been separated. Bernzweig, subsequently was struck over the head and pistol whipped down to the floor causing injury. Shortly after Bernzweig was lying on the floor bleeding from the head all three suspects left in an unknown direction. Kim was able to free herself then rendered aid to Bernzweig and called 911. The Las Vegas Metropolitan Police Department (LVMPD) arrived and took both victims to UMC, filing a police report under event # 040903-0152. A sexual assault exam was performed on victim Julie Kim by S.A.N.E. Nurse L. Ebbert. During forensic examination of the collected evidence, Criminalist David Welch detected foreign male DNA on breast swabs of listed victim Julie Kim. On February 16, 2005, I, Detective Jeffries was notified by Kathy Guenther in DNA Database. She informed me that there was a CODIS (Combined DNA Index System) match to CADOJ (California Department of Justice) Offender Joseph Henderson. The DNA was a positive match to the breast swabs obtained during the sexual assault exam from victim Julie Kim.

The aforementioned information is based upon your Affiant's personal knowledge or reports or witness statements generated during the course of the aforementioned investigation.

Your Affiant is seeking Court authorization to obtain a buccal swab for the identification of DNA from the body of HENDERSON, JOSEPH ALEXANDER. Your Affiant is aware that HENDERSON, JOSEPH ALEXANDER can presently be found at Clark County Detention Center (CCDC), 330 South Casino Center, Las Vegas, Nevada 89101.

Search Warrant
HENDERSON, JOSEPH ALEXANDER

Wherefore, your Affiant requests that a Search Warrant be issued directing a search for and seizure of the aforementioned item at the location set forth herein, requesting that this warrant be ordered to be served at any time of the day or night. Any delay in searching and seizing the described buccal swab may result in the delaying of the perpetrator's identity, and it is my experience that the sooner leads can be obtained and followed, the better the chance of identifying the perpetrator.

In my experience, it is possible- though rare- that the subject of this search may refuse to cooperate in the manner(s) necessary to collect the biological evidence pursuant to this warrant. I therefore request that if necessary to collect the biological evidence pursuant to this warrant. I therefore request that if necessary myself and/or other police officers may use the minimum amount of force necessary to restrain the subject and obtain the samples in the safest and most humane manner possible.

It is further requested that this declaration be sealed by the order of this court due to the following reasons: There is currently an ongoing investigation involving multiple suspects believed to be connected to this incident. Should the facts herein become known the ongoing investigation would be jeopardized.

Search Warrant
HENDERSON, JOSEPH ALEXANDER

M. Jeffries

SUBSCRIBED and SWORN to before me this 17th day of March, 2005.

JUDGE

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in Justice Court of Las Vegas Township, in and for the County of Clark, State of Nevada.

By: _____ Deputy
Date 4-1-05

ORIGINAL

INFO
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STACY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

FILED IN OPEN COURT
JUN 23 2008 20
CHARLES J. SHORT
CLERK OF THE COURT
BY Linda Skinner DEPUTY
LINDA SKINNER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
JOSEPH ALEXANDER HENDERSON, #1502730
Defendant.

Case No: C212968
Dept No: XIV

AMENDED
INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JOSEPH ALEXANDER HENDERSON, the Defendant above named, having committed the crimes of **CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor - NRS 199.480. 205.060); BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060); CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPPING (Felony - NRS 199.480, 200.310, 200.320); FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); CONSPIRACY TO COMMIT SEXUAL ASSAULT (Felony - NRS 199.480, 200.364, 200.366); SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony - NRS 200.364, 200.366, 193.165); CONSPIRACY TO COMMIT**

ROBBERY (Felony - NRS 199.480, 200.380); ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); OPEN OR GROSS LEWDNESS (Gross Misdemeanor - NRS 201.210); and BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Felony - NRS 200.481.2e), on or about the 3rd day of September, 2004, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - CONSPIRACY TO COMMIT BURGLARY

did then and there meet with Unknown Individuals and between themselves, and each of them with the other, wilfully and unlawfully conspire and agree to commit the crime of burglary, and in furtherance of said conspiracy, Defendant did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - BURGLARY WHILE IN POSSESSION OF A FIREARM

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a firearm, and with intent to commit larceny and/or robbery and/or sexual assault, that certain building occupied by JULIE KIM and/or ERIC BERNZWEIG, located at 7833 Lonesome Harbor, Las Vegas, Clark County, Nevada.

COUNT 3 - CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPPING

did then and there meet with unknown individuals and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit the crime of first degree kidnapping, and in furtherance of said conspiracy, Defendant did commit the acts as set forth in Counts 4 and 5, said acts being incorporated by this reference as though fully set forth herein.

COUNT 4 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

did wilfully, unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away JULIE KIM, a human being, with the intent to hold or detain the said JULIE KIM against her will, and without her consent, for the purpose of committing sexual assault and/or robbery, said Defendant using a

deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being responsible under one or more of the following principles of criminal liability; to-wit: (1) by the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown Individuals conspiring with each other to commit the offense of First Degree Kidnapping with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each vicariously liable for the crimes intended; and/or (2) the Defendant and Unknown Individuals aiding or abetting in the commission of the crime by accompanying each other to the crime scene where (they bound Julie Kim at gunpoint and separated her from Eric Bernzweig whereupon she was sexually assaulted and/or robbed, the Defendant and Unknown Individuals encouraging one another throughout by actions and words; acting in concert throughout and fleeing the scene together.

COUNT 5 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

did wilfully, unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away ERIC BERNZWEIG, a human being, with the intent to hold or detain the said ERIC BERNZWEIG against his will, and without his consent, for the purpose of committing robbery, said Defendant using a deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being responsible under one or more of the following principles of criminal liability; to-wit: (1) by the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown Individuals conspiring with each other to commit the offense of First Degree Kidnapping with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each vicariously liable for the crimes intended; and/or (2) the Defendant and Unknown Individuals aiding or abetting in the commission of the crime by accompanying each other to the crime scene where they bound Eric Bernzweig at gunpoint and separated him from Julie Kim whereupon he was robbed, the Defendant and Unknown Individual encouraging one another throughout by actions and words; acting in concert throughout and fleeing the scene together.

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COUNT 6 - CONSPIRACY TO COMMIT SEXUAL ASSAULT

did then and there meet with unknown individuals and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit the crime of sexual assault, and in furtherance of said conspiracy, Defendant did commit the acts as set forth in Counts 7, and 8, said acts being incorporated by this reference as though fully set forth herein.

COUNT 7 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously sexually assault and subject JULIE KIM, a female person, to sexual penetration, to-wit: sexual intercourse, by placing his penis into the genital opening of the said JULIE KIM, against her will, said Defendant using a deadly weapon, to-wit: a firearm, during the commission of said crime.

COUNT 8 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously sexually assault and subject JULIE KIM, a female person, to sexual penetration, to-wit: sexual intercourse, by placing his penis into the genital opening of the said JULIE KIM, against her will, said Defendant using a deadly weapon, to-wit: a firearm, during the commission of said crime.

COUNT 9 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously sexually assault and subject JULIE KIM, a female person, to sexual penetration, to-wit: digital penetration, by placing his finger(s) into the genital opening of the said JULIE KIM, against her will, said Defendant using a deadly weapon, to-wit: a firearm, during the commission of said crime.

COUNT 10 - CONSPIRACY TO COMMIT ROBBERY

did then and there meet with unknown individuals and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit the crime of robbery, and in furtherance of said conspiracy, Defendant did commit the acts as set forth in Counts 10, and 11, said acts being incorporated by this reference as though fully set forth herein.

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COUNT 11 - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of JULIE KIM, or in her presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said JULIE KIM, said Defendant using a deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being responsible under one or more of the following principles of criminal liability; to-wit: (1) by the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown Individuals conspiring with each other to commit the offense of Robbery with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each vicariously liable for the reasonably foreseeable acts of the other conspirators when the acts were in furtherance of the conspiracy; and/or (2) the Defendant and Unknown Individuals aiding or abetting in the commission of the crime by accompanying each other to the crime scene where they bound Julie Kim at gunpoint and separated him from Eric Bernzweig whereupon she was robbed, encouraging one another throughout by actions and words; acting in concert throughout and fleeing the scene together.

COUNT 12- ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: lawful money of the United States, from the person of ERIC BERNZWEIG, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said ERIC BERNZWEIG, said Defendant using a deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being responsible under one or more of the following principles of criminal liability; to-wit: (1) by the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown Individuals conspiring with each other to commit the offense of Robbery with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each vicariously liable for the reasonably foreseeable acts of the other conspirators when the acts were in furtherance of the conspiracy; and/or (2) the Defendant and Unknown Individuals aiding or abetting in the

commission of the crime by accompanying each other to the crime scene where they bound Eric Bernzweig at gunpoint and separated him from Julie Kim whereupon he was robbed, encouraging one another throughout by actions and words; acting in concert throughout and fleeing the scene together.

COUNT 13 - OPEN OR GROSS LEWDNESS

did then and there wilfully and unlawfully commit an act of open or gross lewdness by placing his mouth and/or tongue on the breast(s) of JULIE KIM.

COUNT 14 - BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM

did then and there wilfully, unlawfully and feloniously use force or violence upon the person of another, to-wit: ERIC BERNZWEIG, with use of a deadly weapon, to-wit: a firearm, by striking the said ERIC BERNZWEIG on the head with said firearm, resulting in substantial bodily harm to the said ERIC BERNZWEIG.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY _____
STACY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
BERCH, HENRY – LVMPD	
BERNZWEIG, ERIC – 3886 BILTMORE BAY, LVN 89147	
CUSTODIAN OF RECORDS – LVMPD RECORDS	
EBBERT, LINDA – UNIVERSITY MEDICAL CENTER	
GUENTHER, KATHY – LVMPD P#6109	
JEFFRIES, MICHAEL – LVMPD P#5302	
KIM, JULIE – 3886 BILTMORE BAY, LVN 89147	
WELCH, DAVID – LVMPD P#1418	

DA#05F05146X/mmw/SVU
LVMPD EV#0409030152
CONSP;BURG W/WPN;1ST DEG KIDNAP W/WPN;SEX ASSLT W/WPN; ROBB W/WPN; OG LEWD;BWDW W/SBH - GM/F (TK5)

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ORIGINAL

FILED
Nov 7 | 11 PM '08
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

STATE OF NEVADA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. C212968
	)	C213690
JOSEPH ALEXANDER HENDERSON,	)	Dept. XIV
	)	
Defendant.	)	
	)	

C212968

REPORTER'S TRANSCRIPT
OF
SENTENCING/
PUBLIC DEFENDER'S MOTION TO WITHDRAW DUE TO CONFLICT

BEFORE THE HONORABLE DONALD M. MOSLEY

DISTRICT JUDGE

Taken on Thursday, August 28, 2008

At 9:00 a.m.

APPEARANCES:

For the State: STACY L. KOLLINS, ESQ.
Chief Deputy District Attorney
HAGAR TRIPPIEDI, ESQ.
Deputy District Attorney

For the Defendant: VIOLET R. RADOSTA, ESQ.
Deputy Public Defender

Reported by: Maureen Schorn, CCR No. 496, RPR

RECEIVED
NOV 06 2008
CLERK OF THE COURT

LAS VEGAS, NEVADA. THURSDAY, AUGUST 28, 2008, 9:00 A.M.

* * * *

THE COURT: C212968, State versus Joseph Alexander Henderson. The record will reflect the presence of the defendant in custody. Ms. Radosta is Defense counsel, Ms. Kollins for the State. The matter is on for sentencing.

Are you ready to go forward, Ms. Radosta?

MS. RADOSTA: Yes, Your Honor. I just wanted to point out there is an error on the PSI report, but my client would still like to go forward today with sentencing.

MS. KOLLINS: And, Your Honor, Court's pleasure, I do have two speakers in this matter. I believe the Court has been notified. I don't know if you want to take this now. I was told it was being taken at the end of the calendar.

THE COURT: That would be my desire. Are you needed elsewhere, Ms. Radosta?

MS. RADOSTA: No, Judge.

THE COURT: Let's trail this. Go ahead and have a seat, Mr. Henderson.

MS. KOLLINS: And, Your Honor, there is a mistake in the PSI. Do you want to take that now, or do

you want to wait until later?

THE COURT: Well, is it something we can cure?

MS. KOLLINS: It is just by interlineation. The sentencing on the kidnapping is incorrect. It should be five to life with an equal and consecutive five to life.

MS. RADOSTA: Actually, it's on Page 2 as well as the recommendation. On Page 2 they list the potential penalty for first degree kidnapping with use as a minimum 15 years with the possibility of parole -- I'm sorry, possibility of parole after 15 to life being the minimum sentence.

And it's actually first degree kidnapping is five to life plus an equal and consecutive five to life.

THE COURT: We'll discuss it more fully.

(Whereupon, the matter was trailed on the calendar.)

THE COURT: C212968 State versus Joseph Alexander Henderson. The record will reflect the presence of Mr. Henderson in custody. Ms. Radosta is counsel for the Defense, Ms. Kollins is present for the State.

The matter is on for sentencing, and I would also indicate that there is a companion case, C213690, State

versus Joseph Henderson. There's a motion pending.

MS. RADOSTA: Judge, I'll be handling that as well.

THE COURT: Ms. Radosta will handle that as well. We will take that up after the first matter has been called here.

Are you ready to go forward, Ms. Radosta?

MS. RADOSTA: Yes, Judge.

THE COURT: Mr. Henderson, do you have any legal cause or reason why judgment should not be pronounced against you at this time?

THE DEFENDANT: No, sir.

THE COURT: By virtue of the jury's findings, you are adjudged guilty of Counts 1 through 14.

The State's position, please?

MS. KOLLINS: Your Honor, I have a few things to say based substantially on the jury's verdict, the defendant's record, the recommendation by P and P.

I think probably the first observation I have to relay to the Court is this defendant's record is abhorrent. He has never successfully completed a parole or a probation period. He is a multiple time previous convicted felon, including violent offenses, including offenses with firearms.

I know you've read the PSI. P and P's

recommendation is absolutely spot-on. This man should never, ever be out in our community again.

Where does he go from here? Other than the crimes that were committed against Julie Kim and Eric Bernzweig, the only place he has to go is up, and that's murder. Because this is about as bad as it gets short of a homicide.

Julie and Eric are never going to know any tranquility in their home. They're always going to be suspicious. They're going to live with this for the rest of their life.

No one else in the community should ever, ever, have to endure repeated sexual assaults, being pistol-whipped, having their home invaded. No one else should ever have to do or endure what the defendant put that family through.

He's 38 years old now. He was afforded a fair trial, the jury made their decision. The recommendation, if you follow it, gives him 121 years and a few months on the bottom. The State thinks that's absolutely appropriate. He deserves nothing less, his record deserves nothing less, these victims deserve nothing less.

If this Court is bothered by the longevity of that sentence, what I would ask you to do is run every life sentence that he has been convicted of consecutively.

That would be Count 4, first degree kidnapping with use of a deadly weapon, five to life with a consecutive five to life.

Count 5, first degree kidnapping with a deadly weapon, five to life plus a consecutive five to life.

Counts 7, 8 and 9, each sexual assaults with a deadly weapon, ten to life plus ten to life for each one of those all to run consecutively.

If this Court is hesitant to follow the recommendation, which I stand here and tell you that the State believes this is absolutely appropriate given these offenses, given his record, and given his proclivity from other cases that we know.

He had a case where he was going around UNLV fondling young ladies. So his sexual aberrations are apparent in his history.

I would ask you, again, I want to reiterate the 120 on the bottom is absolutely appropriate, but if this Court hesitates to do that, I would ask you for all of the life sentences to run consecutively.

THE COURT: All right. Now, let me get a couple of things clarified here for the edification of all present. Earlier there was mention of Count 4 and Count 5 being an improper recommendation.

MS. KOLLINS: It is incorrect in the PSI.

It should be 60 months to life with an equal and consecutive 60 months to life, instead of the 180 months.

THE COURT: Do you concur in that, Ms. Radosta?

MS. RADOSTA: Yes, Judge. That, I believe, is the current -- well, it was the state of the law at the time that this crime was committed.

MS. KOLLINS: That is correct.

THE COURT: And that begs the next question I was going to ask. Do we all understand and concur that the equal and consecutive enhancement was in effect at the time of this offense?

MS. KOLLINS: Yes, we do, Judge.

THE COURT: Not to do with the statute.

MS. RADOSTA: Right, Judge. And I believe that the State Supreme Court has recently ruled that it's not retroactive, that the new 1 to 20 consecutive is not retroactive to the date that the deadly weapon enhancement went into effect.

THE COURT: All right. Mr. Henderson, is there anything you want to say before your attorney speaks?

THE DEFENDANT: Yes, Your Honor. I would like to say I maintain my innocence. I do feel sorry for Ms. Kim and her husband. I sat in the trial and heard

everything that happened, and I really feel sorry for them because I would not want that to happen to me.

And I know that the DA has a job to do, but I am innocent of this crime and I plan on proving that not today, because I was found guilty in this trial, but I'm quite sure something will come up where I can get my life back.

I know I have a lengthy record, but nothing like what I'm being accused of, and you've got my record right there. I haven't been a good boy, but I have never did a robbery, I have never had a robbery case, never, ever sexual assault, never, ever those type of cases with this type of severe time. Maybe a little drug cases here and there, but I never did nothing like this.

I mean, honestly, to be honest with you, Mosley, I got framed, I really got framed.

THE COURT: Who framed you?

THE DEFENDANT: The police framed me. I mean, either the police, somebody had to frame me. I was framed.

THE COURT: Ms. Kollins?

MS. KOLLINS: I would just remind the Court the DNA evidence in this case.

THE DEFENDANT: I was framed. I mean it from my heart.

THE COURT: Ms. Radosta?

MS. RADOSTA: Judge, my client Mr. Henderson did touch on one of the things that I wanted to address with Your Honor. The State said he has an abhorrent record. I would completely disagree with that statement.

Yes, he has four prior felonies, Judge, but we've seen much worse than these types of felonies. There is one violent felony from 18 years ago, assault with a firearm on a person in 1990.

Other than that, Judge, it was possession of a firearm and that was in 1995. And the two most recent felonies are both drug related in '97 and then in '99. Those are -- and that's his record.

Yes, an active criminal history, but it's hardly an abhorrent record, Judge, where you need to treat this case as somehow one of the worst you've ever seen, in all honesty, Judge.

Ms. Kollins also stated that she felt that the recommendation in this case was spot-on. Even under the old sentencing guidelines for a murder case, Judge, Ms. Kollins is recommending to this Court that you sentence my client as though he had killed three people.

121 years to life would be three consecutive 40-to-life sentences, Judge. And while there is absolutely no getting around the fact that this was an

incredibly painful and life-altering experience for the victims in this case, Judge, the fact of the matter is, it's not the worst that we've all seen, it's not to the level of murder and it should not be treated in that manner.

This is a situation where I'm remembering the testimony correctly, although the jury did come back with the sexual assault with use of a deadly weapon, the testimony at times during the trial was that Ms. Kim didn't always necessarily know where the weapon was while the sexual assault was happening, so it's not as though the gun was being held directly to her head while this was happening.

And I'm certainly not suggesting to Your Honor this wasn't a horrific experience for her, but it could have been worse. And that's a hard thing to say, but it certainly could have been worse, and I would ask Your Honor to keep that in mind when making your decision in this particular case.

To run burglary counts consecutive to robbery counts consecutive to kidnapping counts, when there were two victims in this particular case, Judge, to run each of the -- I mean, P and P recommends of the 14 felonies and gross misdemeanors that my client was convicted of, they run ten of them consecutive to one another.

That's completely excessive in this particular case. There were multiple people involved in this, Your Honor, and my client on some of those counts was convicted on aiding and abetting theory. So I would ask Your Honor to also keep that in mind.

What I would suggest to Your Honor is to perhaps run one of the most serious counts involving Ms. Kim, the sexual assault with use of a deadly weapon, which would be a 20 to life, and one of the most serious counts involving her husband, Dr. Bernzweig, consecutive.

And that would be either the first degree kidnapping, which would be a ten to life, or depending on how Your Honor looks at it, the robbery with use of a deadly weapon, which would be 6 to 15, plus an equal and consecutive 6 to 15.

It doesn't have the life tail, but it does have more time on the bottom end. So somewhere in the neighborhood of 30 to 35 years to life would be the actual sentence, being the most straightforward way of putting it, Judge.

In the end, Your Honor, there is certainly no getting around, as I stated, that this was an incredibly difficult experience for the victims in this case. But that being said, part of the Court's job is to keep everything in perspective and not be persuaded by this one

victim's experience.

Mr. Henderson is not the worst of the worst, it's just that simple. He's had very little violent contact with the system prior to this, Judge, and I'd ask you to keep that in kind when you sentencing him.

THE COURT: Now, just so we're sure we're recommending what we intend to recommend, Ms. Kollins suggests five to life on the kidnapping, and you're suggesting ten to life.

MS. RADOSTA: Well, it's five to life with an equal and consecutive five to life.

THE COURT: Just so we understand.

MS. RADOSTA: And I believe Ms. Kollins, I think that's what she --

MS. KOLLINS: I concur the PSI is correctly written as to the first three kidnapping counts. It's five to life as required, a consecutive five to life with the weapon.

THE COURT: Now, incidentally, I assume that everybody did receive a Supplemental Presentence Investigation Report?

MS. RADOSTA: Yes, Judge. I received it this morning. Ms. Kollins gave me a copy of it.

MS. KOLLINS: Well, I received the original PSI yesterday that was erroneous, and I called P and P and

they actually edited it during the day yesterday and provided it this morning.

THE COURT: So we're satisfied we have the proper document?

MS. RADOSTA: Yes, Judge. And for the record, I did provide both the original and the supplemental to Mr. Henderson.

THE COURT: All right. Let's have a seat and hear from our speakers if they wish to be heard.

MS. KOLLINS: Mr. Bernzweig.

Whereupon,

ERIC BERNZWEIG,

was called as a Speaker by the State, and having been first duly sworn, was examined and testified as follows:

THE COURT: Sir, would you state your full name, please?

THE SPEAKER: Eric Bernzweig, B-e-r-n-z-w-e-i-g.

THE COURT: Please tell us what you would have us know?

THE SPEAKER: I just want to take a moment to thank the Court and just say that the wheels of American justice do grind slowly, but they grind

correctly. And what's happened here is the correct thing and the fact that this man is guilty.

I've been asked to talk about the things that have personally affected me, and every single facet of my life has been affected. And the truth is that I'm a man that has always put his life off for bigger and better things, going to college, going to dental school, going to postgraduate work, starting to practice out of nowhere, leaving my family back at home to start anew in a strange land.

But the truth is that the best part of my life was coming. I met my future wife at that point and she was going to convert to Judaism for me. We were just weeks away. We were coming back home from San Diego on a long weekend four years almost to the day.

We were coming home from San Diego. We were talking about having a baby, having a big wedding, all of the things that I had always put my life off for. These were the things that the money and the success was secondary, that I should find my wife, that I should have a child.

But since that day that all of this happened, there is no talk of children. This man raped my wife. He beat me up, big deal. He's killed my unborn child. The truth is that my wife and I at that time were dating.

Everybody says when you get married it's the happiest day of your life. I found my soul mate, I really did.

And at this point she's not the same person that she used to be. She's never going to be the same person that I knew, the person that wanted to have a child. All of this has been for nothing.

The money and the success means nothing. The fact that my life and her life have been irreparably damaged because somebody wanted to come to Las Vegas and have a good time at the price of my wife.

You talk about a shortened sentenced, ma'am, you can come to my house and we'll give you a play-by-play and you'll tell me if you want a shortened sentence.

THE COURT: Sir, address me.

THE SPEAKER: I'm sorry, sir. The truth is that we came into court the day before court and this guy came in with an offer for a shortened plea, and he thumbed his nose at the Court. And at the last second said, no, I'll come to trial. He rolled the dice and that's what's coming to him.

Talk about things, this is my personal life. Money wise, the house that I had built was a dream house. We couldn't believe we found this. We had to sell it at the top of the real market, you know what's going on with real estate.

We had to take a $50,000 hit because we had to tell the person coming in what had happened to us, the embarrassment. All the people that we knew and friends and the people we had made friends with now don't even speak to us. We're marked.

Just as this was all happening we were starting up. When I came to town I knew that I would be successful because nothing would stand in my way. I wouldn't step over anybody, but I would do what I could to make myself successful.

We signed a lease for a second office and you, Judge, let me talk to you directly. When you were just like me, you went to college, you went to graduate school, you didn't know if you were going to be a judge. But the truth is, you had the drive. How many judges are out there. You were at the top of your game.

That's where i was going until September 3rd, 2004. I had it all planned. It was a plan that was going to work at the top of the economy. Now I have two offices that I can't keep on top of anymore. My life is shot.

Let's talk about my personal being. Health, I've put on 40 pounds since this all happened. I am now an uncontrolled diabetic and I've got high blood pressure. And the truth is that I can't give an exact date, but this has easily taken ten years off of my life with the

everyday stress that she and I have to go through.

Now even just this morning the back door was open. I can't leave the garage door open without freaking out. When you have a nice day in Las Vegas, you open the back door to get a breeze. I can't step away from the door thinking that somebody is going to come into my home and rape my wife.

The truth is that this is why I had a life planned. That life plan started in 1984 when I started college and continued to the day of 2004, almost to the day of starting college, 20 years. Everything has been put on hold over one stinking hour.

It was something that I didn't put into the equation, which was some jerk coming into my place and -- whatever someone it seems to have been a targeted type of thing. What did you do to make somebody do this to you?

The truth is, what little I know about law, I know some. But I know an eye for eye and a tooth for a tooth. What do you pay for two lives that have been irreparably damaged?

THE COURT: Let me interrupt you just briefly. You mentioned that you are looked down upon by your friends. That's my word, something of that nature. Let me make an observation here.

I heard the entire trial. You have nothing to be

ashamed of, number one. Number two, you and your wife are the victims here. Anybody worth their salt would understand that.

Number two, it's none of my business, I would concede that right up front, but why this would interfere with your plans to be married and have a child I do not understand. I think you might reevaluate that. You have a beautiful wife. There's no reason in the world why you couldn't be married and have a child in my judgment, for what it's worth. And, again, it's none of my business.

Is there anything else you want to say, sir?

THE SPEAKER: I just want to say that when you hear the word "predator" you think of a lion or a bear, and you consider that that predator kills to eat and feeds children. It kills to protect its children.

A human predator preyed on people without remorse is the truth. This guy came in knowing what he was going to do. And the fact was it was 1:00 o'clock in the morning in a private house, nothing was going to stop him.

Thank God that I was able to get out of my shackles, and these guys thought I was going to die because I had so much blood coming out of my head. Because the party that this guy had on my wife, I can't imagine, I can't imagine what could have been that the fact that thank goodness that he cracked my head open, his

friend cracked my head open. Because the party would have continued all night long in my eyes.

I've been told, again, this is my business, it is my business, but it's not, it's the fact of the Court, that possible sentence could be 20, 30, 40, even beyond.

But if you think about the numbers in 20 years, this guy is going to be 55 years old, very much able to overpower an adult, a young child or an elderly person and do what he wants.

In 30 years he'll be 65 years old, not a young man, but still in today's society still very, very young. He could still -- he may not be able to overpower an adult, but maybe a young child or an elderly woman or man, whatever he happens to feel like that date.

In 40 years he'll be 75, again, still able to overpower and trick a young child. Don't let this man out. If you would, Your Honor, just infuse a little of what we could consider a little -- well, if you could throw the book at this guy, give gavel. And if you happen to have a brick under your table there, that would be good too.

But the truth is that the longer this guy is put out of commission, the better.

THE COURT: Any questions from the State?

MS. KOLLINS: No, Your Honor.

THE COURT: Defense counsel?

MS. RADOSTA: No, Your Honor.

THE COURT: Thank you, sir.

THE SPEAKER: Thank you, Your Honor.

MS. KOLLINS: Ms. Kim, Your Honor.

THE COURT: Very good.

Whereupon,

JULIE BERNZWEIG,

was called as a Speaker by the State, and having been first duly sworn, was examined and testified as follows:

THE COURT: State your name for the record, please?

THE SPEAKER: Julie Bernzweig, B-e-r-n-z-w-e-i-g.

THE COURT: You're married?

THE SPEAKER: Yes.

THE COURT: Go ahead.

THE SPEAKER: I wrote a speech today, but it doesn't seem to quite cover all the phases after everything that I've heard today. Every time I come to this point I think of what happened to me four years ago, and I relive that day every single month.

I don't know what it's like for anybody else, but

how can you put a cost on your own sanity? You can go on and blame his past or his upbringing or whatever excuses you may have for him, but nothing changes the fact of what he did to me and how it's affected our lives.

I begged him for mercy not to do that to me, and I hope you won't give him any mercy during sentencing. I'm not happy to be here today. I wish this never would have happened to me.

I keep thinking it just can't be, I've always lived my life so carefully to avoid these kinds of things, and I never would have thought it would have happened to me in my own home.

And it's true I'll never be what I was, I'll never be trustworthy, I'll never have peace. But, hopefully, after today I will have some sort of closure knowing that he's going to be put away forever. Thank you.

THE COURT: Questions from the State?

MS. KOLLINS: No, Your Honor.

THE COURT: Defense counsel?

MS. RADOSTA: No.

THE COURT: Thank you. All right. Well, it's clear that the recommendation is going to be followed here.

Count 1, conspiracy to commit robbery, a gross

misdemeanor, in accordance with the law of the State of Nevada, 12 months in the County Jail.

Count 2, burglary while in possession of a firearm, 106 months in prison, eligibility of parole after 62 months to run concurrently with the gross misdemeanor.

Count 3, conspiracy to commit first degree kidnapping, a felony, 60 months in prison, eligibility of parole after 24 months to run consecutively.

Count 4, first degree kidnapping with use of a deadly weapon, life imprisonment, eligibility of parole after 60 months, and an identical term of what is known as an enhancement to run consecutively, life imprisonment, eligibility of parole after 60 months. The sentence will run consecutively to the other counts.

Count 5, first degree kidnapping with use of a deadly weapon, life imprisonment, eligibility of parole after 60 months, an identical term to run consecutively by operation of law, an enhancement of life imprisonment, eligibility of parole after 60 months. This sentence will run consecutively.

Count 6, conspiracy to commit sexual assault, 60 months in prison, eligibility of parole after 24 months, again to run consecutively.

Count 7, sexual assault with use of a deadly weapon, life imprisonment, eligibility of parole after 120

months, an identical term by virtue of the use of the weapon, the enhancement of life imprisonment, eligibility of parole after 120 months by operation of law to run consecutively. This sentence, Count 7, will run concurrent with the other sentences, other counts.

Count 8, sexual assault with use of a deadly weapon, life imprisonment, eligibility of parole after 120 months, an identical term of life imprisonment, eligibility of parole after 120 months as an enhancement for the use of the deadly weapon to run consecutively. Count 8 will run consecutive to the other counts.

Count 9, sexual assault with use of a deadly weapon, life imprisonment, eligibility of parole after 120 months, plus an identical term as an enhancement, life imprisonment, eligibility of parole after 120 months to run consecutively. Count 8 will run consecutively to the other counts.

Count --

MS. KOLLINS: I'm sorry, Your Honor. Was that Count 9?

THE COURT: Count 9. Count 10, conspiracy to commit robbery, 60 months in prison, eligibility of parole after 24 months. Count 10 will run consecutive to the other counts.

Count 11, robbery with use of a deadly weapon,

180 months in prison, eligibility of parole after 72 months, an identical term of 180 months in prison, eligibility of parole after 72 months to run consecutively as an enhancement by virtue of the use of a deadly weapon. Count 11 will run concurrent to the other counts.

Count 12, robbery with use of a deadly weapon, a term of 180 months in prison, eligibility of parole after 72 months. Count 12 will run consecutive to the other counts.

Count 13, open and gross lewdness, a gross misdemeanor, 12 months in the County Jail to run concurrently, notwithstanding the recommendation.

Count 14, battery with use of a deadly weapon resulting in substantial bodily harm, 156 months in prison, eligibility of parole after 62 months. Restitution in the amount of $50,000.

And there is substantial credit for time served of 1,251 days.

MS. KOLLINS: Your Honor, Count 14 to run?

THE COURT: I'm sorry, consecutive to the other counts.

MS. KOLLINS: Thank you, Judge.

MS. RADOSTA: Actually, Judge, I don't think that that -- actually, let me double-check. No, that's not -- I don't even understand --

MS. KOLLINS: That's what I show 1,251. If you want to put it back on.

MS. RADOSTA: I'm just looking at it and the numbers don't make any sense, Judge. They're actually saying from March of '05 to July of '05 it's 1100 days. But if I find out that it's wrong, Judge, I will put it back on calendar.

THE COURT: Well, certainly, the Court contemplates full credit for time served. If it needs to be adjusted we can do so.

THE CLERK: Judge, does Count 12 not have an enhancement? Robbery with use.

MS. KOLLINS: It should.

THE COURT: Did I not mention that?

Count 12, robbery with use of a deadly weapon would contemplate the basis for an enhancement, an identical term of 120 months in prison, eligibility of parole after 72 months to run consecutively would be the proper sentence.

MS. KOLLINS: The only other thing I would ask for is the special condition of lifetime supervision and registration as a sex offender.

THE COURT: The sentence has been passed in conformity to the law. The condition that you mentioned, Ms. Kollins, certainly applies so that may be

incorporated.

Now, as to the latter matter on calendar here, C213690, Ms. Trippiedi?

MS. TRIPPIEDI: I believe it was the Public Defender's motion to withdraw, Judge.

MS. RADOSTA: And the State was to find out by today's date whether or not they could locate one of the -- Robin Poole, who was the former client of the Public Defender's office that we have a conflict with.

MS. TRIPPIEDI: And we have not ever been able to serve her or locate her at this time. So there's no conflict because we're not going to be using her.

THE COURT: Well, are you announcing at this time regardless of what may develop you're not going to use her?

MS. TRIPPIEDI: No. We will not be using her, that's correct.

THE COURT: The Public Defender will remain. We have a jury trial scheduled here going forward the 8th of September. We have that decision to make.

MS. TRIPPIEDI: I don't believe so, Judge. This is Amos Stege's case.

MS. RADOSTA: Judge, I believe we have calendar call on Tuesday on that.

THE COURT: We'll just wait until the 3rd

and see what the status is. That will be entertained the 3rd. Thank you very much.

ATTEST: Full, true and accurate transcript of proceedings.

MAUREEN SCHORN, CCR NO. 496, RPR

W

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ORIGINAL

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSEPH ALEXANDER HENDERSON
#1502730

Defendant.

CASE NO. C212968

DEPT. NO. XIV

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor) in violation of NRS 199.480, 205.060; COUNT 2 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony) in violation of NRS 205.060; COUNT 3 – CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPING (Category B Felony) in violation of NRS 199.480, 200.310, 200.320; COUNT 4 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.310, 200.320, 193.165; COUNT 5 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.310, 200.320, 193.165; COUNT 6 –

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CLERK OF THE COURT

CONSPIRACY TO COMMIT SEXUAL ASSAULT (Category A Felony) in violation of NRS 199.480, 200.364, 200.366, of COUNT 7 – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.364, 200.366, 193.165; COUNT 8 – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.364, 200.366, 193.165; COUNT 9 – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.364, 200.366, 193.165; COUNT 10 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony) in violation of NRS 199.480, 200.380; COUNT 11 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165; COUNT 12 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165; COUNT 13 – OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210; COUNT 14 – BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony) in violation of NRS 200.481(2)(e), and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor) in violation of NRS 199.480, 205.060; COUNT 2 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony) in violation of NRS 205.060; COUNT 3 – CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPING (Category B Felony) in violation of NRS 199.480, 200.310, 200.320; COUNT 4 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.310, 200.320, 193.165; COUNT 5 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.310, 200.320, 193.165; COUNT 6 – CONSPIRACY TO COMMIT SEXUAL ASSAULT (Category A

Felony) in violation of NRS 199.480, 200.364, 200.366, of COUNT 7 – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.364, 200.366, 193.165; COUNT 8 – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.364, 200.366, 193.165; COUNT 9 – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.364, 200.366, 193.165; COUNT 10 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony) in violation of NRS 199.480, 200.380; COUNT 11 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165; COUNT 12 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165; COUNT 13 – OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210; COUNT 14 – BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony) in violation of NRS 200.481(2)(e); thereafter, on the 28th day of August, 2008, the Defendant was present in court for sentencing with his counsel, VIOLET RADOSTA, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the $25.00 Administrative Assessment Fee, $150.00 DNA Analysis Fee including testing to determine genetic markers, and $50,000.00 Restitution, the Defendant is SENTENCED as follows: AS TO COUNT 1 - TO TWELVE (12) MONTHS in the Clark County Detention Center (CCDC); AS TO COUNT 2 - TO A MAXIMUM of ONE HUNDRED FIFTY-SIX (156) MONTHS with a MINIMUM Parole Eligibility of SIXTY-TWO (62) MONTHS in the Nevada Department of Corrections (NDC), to run CONCURRENT with COUNT 1; AS TO COUNT 3 - TO A MAXIMUM of SIXTY (60)

MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS in the Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 2; AS TO COUNT 4 – TO LIFE with a MINIMUM Parole Eligibility after SIXTY (60) MONTHS, plus an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM of SIXTY (60) MONTHS for the Use of a Deadly Weapon in the Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 3; AS TO COUNT 5 – TO LIFE with a MINIMUM Parole Eligibility after SIXTY (60) MONTHS, plus an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM of SIXTY (60) MONTHS for the Use of a Deadly Weapon, in the Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 4; AS TO COUNT 6 - TO A MAXIMUM of SIXTY (60) a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS in the Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 5; AS TO COUNT 7 - TO LIFE with a MINIMUM Parole Eligibility of ONE HUNDRED TWENTY (120) MONTHS, plus an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM of ONE HUNDRED TWENTY (120) MONTHS for the Use of a Deadly Weapon in the Nevada Department of Corrections (NDC), to run CONCURRENT with COUNT 6; AS TO COUNT 8 - TO LIFE with a MINIMUM Parole Eligibility of ONE HUNDRED TWENTY (120) MONTHS, plus an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM of ONE HUNDRED TWENTY (120) MONTHS for the Use of a Deadly Weapon in the Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 7; AS TO COUNT 9 - TO LIFE with a MINIMUM Parole Eligibility of ONE HUNDRED TWENTY (120) MONTHS, plus an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM of ONE HUNDRED TWENTY (120) MONTHS for the Use of a Deadly Weapon in the Nevada Department of Corrections, to run CONSECUTIVE to COUNT 8; AS TO COUNT 10 - TO A

MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS in the Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 9; AS TO COUNT 11 - TO A MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of SEVENTY-TWO (72) MONTHS, plus an EQUAL and CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MAXIMUM and SEVENTY-TWO (72) MONTHS MINIMUM for the Use of a Deadly Weapon in the Nevada Department of Corrections (NDC), to run CONCURRENT with COUNT 10; AS TO COUNT 12 – TO A MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of SEVENTY-TWO (72) MONTHS, plus an EQUAL and CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MAXIMUM and SEVENTY-TWO (72) MINIMUM for the Use of a Deadly Weapon in the Nevada Department of Corrections, to run CONSECUTIVE to COUNT 11; AS TO COUNT 13 - TO TWELVE MONTHS (12) in the Clark County Detention Center (CCDC), to run CONCURRENT with COUNT 12; AS TO COUNT 14 - A MAXIMUM of ONE HUNDRED FIFTY-SIX (156) MONTHS with a MINIMUM Parole Eligibility of SIXTY-TWO (62) MONTHS in the Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 13; with ONE THOUSAND, TWO HUNDRED, FIFTY-ONE (1,251) DAYS credit for time served.

FURTHER ORDERED, a SPECIAL SENTENCE of LIFETIME SUPERVISION is imposed to commence upon release from any term of imprisonment, probation or parole.

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ADDITIONALLY, the Defendant is ORDERED to REGISTER as a sex offender in accordance with NRS 179D.460 within FORTY-EIGHT (48) HOURS after any release from custody.

DATED this 24th day of September, 2008

Donald M. Mosley

DONALD M. MOSLEY
DISTRICT JUDGE

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

NO. 52573

FILED

APR 01 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,	)	NO. 52573
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 52573

APPELLANT'S OPENING BRIEF

ISSUES PRESENTED FOR REVIEW

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. THE COURT ERRED WHEN IT DENIED THE DEFENSE MOTION IN LIMINE AND THE GOVERNMENT SHOULD HAVE BEEN PRECLUDED FROM ARGUING AND PRESENTING EVIDENCE THAT JOSEPH HENDERSON'S IDENTITY IS ASSUMED AS A RESULT OF THE DNA TESTING

IV. MR. HENDERSON'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COURT DENIED DEFENSE MOTION FOR A MISTRIAL AFTER THE TESTIMONY OF KIM MURGA

V. MR. HENDERSON WAS DENIED A FAR 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.

STATEMENT OF THE CASE

This matter stems from a Notice of Appeal filed on October 9. 2008. (APP. 300-303).

Joseph Henderson was charged in a fourteen count Information filed on July 11, 2005, with multiple charges: 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, sexual assault with use of a deadly weapon, conspiracy to commit robbery, robbery with use of a deadly weapon, open or gross lewdness, battery with use of a deadly weapon resulting in substantial bodily harm. (APP. 129-135).

Jury trial was held in this matter before the Honorable Donald M. Mosley, Department XIV, from June 23 through June 27. At the conclusion of the trial the jury returned verdicts of guilty. (APP. 286-289).

Mr. Henderson was sentenced to: Count 1 (Conspiracy to Commit Burglary) – 12 months in the Clark County Detention Center; Count 2 (Burglary While in the Possession of a Firearm) – a maximum of 156 months with a minimum parole eligibility of 62 months in the Nevada Department of Corrections, to run concurrent with Count 1; Count 3 (Conspiracy to Commit First Degree Kidnapping) – a maximum of 60 months with a minimum parole eligibility of 24 months in the Nevada Department of Corrections, to run consecutive with Count 2; Count 4 (First Degree Kidnapping with the use of a Deadly Weapon) – to Life with a minimum parole eligibility after 60 months plus an equal and consecutive term of Life with a minimum parole eligibility after 60 months for the use of a deadly weapon, to run consecutive to Count 3; Count 5 (First Degree Kidnapping with the use of a Deadly Weapon) - to Life with a minimum parole eligibility after 60 months plus an equal and consecutive term of Life with a minimum parole eligibility after 60 months for the use of a deadly weapon, to run consecutive to Count 4; Count 6 (Conspiracy to Commit Sexual Assault) - a maximum of 60 months with a minimum parole eligibility of 24 months in the Nevada Department of Corrections, to run

consecutive with Count 5; Count 7 (Sexual Assault with use of a Deadly Weapon) - to Life with a minimum parole eligibility after 120 months plus an equal and consecutive term of Life with a minimum parole eligibility after 120 months for the use of a deadly weapon, to run concurrent to Count 6; Count 8 (Sexual Assault with use of a Deadly Weapon) - to Life with a minimum parole eligibility after 120 months plus an equal and consecutive term of Life with a minimum parole eligibility after 120 months for the use of a deadly weapon, to run consecutive to Count 7; Count 9 (Sexual Assault with use of a Deadly Weapon) - to Life with a minimum parole eligibility after 120 months plus an equal and consecutive term of Life with a minimum parole eligibility after 120 months for the use of a deadly weapon, to run consecutive to Count 8 ; Count 10 (Conspiracy to Commit Robbery) - a maximum of 60 months with a minimum parole eligibility of 24 months in the Nevada Department of Corrections, to run consecutive with Count 9; Count 11 (Robbery with use of a Deadly Weapon) - a maximum of 180 months with a minimum parole eligibility of 72 months in the Nevada Department of Corrections plus an equal and consecutive term of 180 months with a minimum parole eligibility after 72 months for the use of a deadly weapon, to run concurrent to Count 10; Count 12 (Robbery with use of a Deadly Weapon) - a maximum of 180 months with a minimum parole eligibility of 72 months in the Nevada Department of Corrections plus an equal and consecutive term of 180 months with a minimum parole eligibility after 72 months for the use of a deadly weapon, to run consecutive to Count 11; Count 13 (Open and Gross Lewdness) - 12 months in the Clark County Detention Center to run concurrent to Count 12; Count 14 (Battery with use of a Deadly Weapon Resulting in Substantial Bodily Harm) - a maximum of 156 months with a minimum parole eligibility of 62 months in the Nevada Department of Corrections, to run consecutive with Count 13.

Mr. Henderson was given 1,251 days for credit served. (APP. 294-299; 304-319).

STATEMENT OF THE FACTS

Eric Bernweig and his fiancé, Julie Kim, were in bed on the evening of 3, 2004 when their doorbell rang around 12:30 a.m. (APP. 433; 463) Mr. Bernweig went downstairs to answer the door. When Mr. Bernweig answered the door, the man at the door told Mr. Benrweig that his child had thrown a set of keys over the back wall of Mr. Bernweig's home and the man needed to look for them. Ultimately the search for the keys proved fruitless and when Mr. Bernweig came back into the house, "there were two men standing in the front of the garage, the inside garage door, with pistols in their hands with laser sights." (APP. 464) About this time, Ms. Kim came downstairs to see what was going on. The armed intruders began ordering Mr. Bernweig and Ms Kim to produce money and asking about the location of a safe.

Ms. Kim was tied up while the suspects ransacked the house. To keep her quiet, the assailant put a cat toy in Julie Kim's mouth. (APP. 436) He began to touch her breast and buttocks under her clothes. (APP. 437) Eventually, he moved her to another room. (APP. 437) After moving Ms. Kim to the other room, the assailant began to touch her vagina. (APP. 438). At some point, he laid Ms. Kim on the couch. He placed his mouth on her breast. (APP. 440) She then heard him unbuckle his pants and "put his penis inside of me." (APP. 439) This did not last very long because there was noise upstairs that distracted the assailant. (APP. 439) The assailant then moved Ms. Kim upstairs to the master bedroom and had her lay down on the bed. After telling her to "get in the doggie position", he raped her again. (p. 442)

The suspects ultimately fled the residence and the Bernweigs contacted 9-1-1.

Because the assailants wore masks they were unable to be identified. However, the government was able to collect DNA from Ms. Kim's vagina and breast, and semen from a bed sheet. The foreign DNA was uploaded into the National DNA Index system for comparison. A DNA profile was developed from the reference standard and connected to Joseph Henderson.

Three separate tests were performed concerning the DNA. The records are clear that a portion of the swabs taken from Joseph Henderson were used for comparison. However, the same was not true regarding the suspect evidence collected at the scene. Breast swabs were extracted and apparently consumed to the point where retesting would be impossible. Additionally, DNA was extracted from the bed sheets from the upstairs bedroom. However, nearly all of the material was extracted in order to obtain a sufficient profile. Lastly, two vaginal swabs were collected and apparently completely used during the course of the DNA testing. Thus there was insufficient DNA material in order for the defense to retest the DNA in the Joseph Henderson case.

ARGUMENT

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.

Joseph Henderson was discovered by the Government by what is known as a "cold hit" case. The unidentified DNA material was entered into a national database. This gave the Government the possibility that Henderson may be the source of the DNA material left at the crime scene and on the female victim. Based on this information, the Government obtained sample swabs of Joseph's DNA material. These samples were then compared to the semen in the vaginal swabs, on the bed sheets, as well as saliva collected from the breast of the female victim. In the course of the testing, all or significant portions of this DNA material was consumed by the Government. (The State's position was that there was not a swab available, but that there was an extraction from the original piece of evidence. (APP. 338)) Accordingly, Joseph Henderson was in the position where he could not retest and challenge the conclusions of the Government's experts. Therefore, dismissal of the charges against Henderson was appropriate.

Loss or destruction of the evidence by the State violates due process, "only if the defendant shows either that the State acted in bad faith or that the defendant suffered undo prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed." **Leonard v. State**, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001). These standards are in the disjunctive. In other words, Mr. Henderson had only to show either bad faith on the part of the State or that he suffered prejudice from the lost. "To establish prejudice, the defendant must show that it could be reasonably anticipated the evidence would have been exculpatory and material to the defense." **Cook v. State**, 114 Nev. 120, 125, 953 P.2d 712, 715 (1998).

When evidence is lost as a result of inadequate government handling, a conviction may be reversed. **Howard v. State**, 95 Nev. 580, 600 P.2d 214 (1979); **United States v. Heiden**, 508 F.2d 898 (Cir. 1974). For more than 30 years, both the Nevada Supreme Court as well as the Ninth Circuit Court of Appeals have reiterated that a defendant must show either 1) bad faith or contrivance on the part of the government; or 2) prejudice from its lost. Id.

Henderson could show both in the instant case. First, the DNA evidence was mishandled in bad faith. When the Government undertook the steps to attempt to match Joseph Henderson to the DNA, it was aware that no suspect was initially developed. Also the results of the DNA testing were critical to solidifying Henderson as the individual who not only participated in the crimes, but specifically performed the alleged sexual assaults.

Even more troubling is the fact that the Government was already aware that Joseph Henderson had counsel when some of the testing which destroyed the remaining DNA was performed. Joseph was arrested on or about March of 2005. The final testing performed by the Forensic Laboratory was done in the end of July of 2005. Defense counsel was never contacted and notified that the testing may diminish or completely eliminate the ability to retest the materials. Thus, Mr. Henderson showed bad faith on the part of the Government as outlined by **Leonard**, Supra.

Additionally, and separately, Joseph Henderson suffered undo prejudice from the lost evidence. The lost evidence is material and potentially exculpatory to the defense. **Cook**, Supra. Henderson had a DNA forensic expert review all the records of reports provided by the Forensic Crime Lab. Based on the defense expert's review of the records there were several areas where the extraction and examination of the DNA material could be called into question. Additionally, there was insignificant remaining DNA material from all the swabbings to retest. Thus, Mr. Henderson established that the sole piece of evidence linking him to the crime scene was potentially exculpatory and certainly material to the defense.

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.

The Defense filled a Motion to Dismiss for failure to Preserve Evidence. The Court denied the motion. In the alternative the Defense asked for alternative relief. Because of the State's failure to preserve enough DNA sample for the defense to independently test, the court could have precluded the government from presenting evidence regarding the results of the DNA testing. See, **Sandborn v. State**, 107 Nev. 399, 812 P.2d 1279 (1991). The court failed to do so and therefore failed to protect Mr. Henderson's right to due process. In the second alternative, the court could have provided an instruction that the mishandled DNA evidence prejudiced Mr. Henderson, and that the jury be instructed conclusively that the DNA material did not match him. Id. 408, 812 P.2d at 1286. Failure to do so violated Mr. Henderson's right to due process.

III. THE COURT ERRED WHEN IT DENIED THE DEFENSE MOTION IN LIMINE AND THE GOVERNMENT SHOULD HAVE BEEN PRECLUDED FROM ARGUING AND PRESENTING EVIDENCE THAT JOSEPH HENDERSON'S IDENTITY IS ASSUMED AS A RESULT OF THE DNA TESTING

Mr. Henderson's Motion in Limine challenged the nature and extent by which the State's expert could testify and the prosecutor could argue regarding conclusions of the DNA testing.

The motion in limine asked the Court not to allow inaccurate and unreliable testimony concerning DNA evidence. The government should not have been able to present nor argue statistical evidence to suggest that the DNA evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having him found in a randomly selective sample.

The Court's have held that evidence cannot be present nor arguments made concerning the "prosecutor's fallacy." The Prosecutor's fallacy occurs when the prosecutor elicits testimony that confuses source probability with random match probability. Put another way, Prosecutor err when he or she "presents statistical evidence to suggest that the [DNA] evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having been found in a randomly selective sample." **Brown v. Farwell**, 208 U.S. App. Lexus 9637 (9th Cir. May 5, 2008), Citing, **United States v. Chischilly**, 30 F. 3d 1144, 1157 (9th cir. 1994). In the **Chischilly** case, the Court said:

> "To illustrate, suppose the .... Evidence establishes that there is a 1 in 10,000 chance of a random match. The jury might equate this likelihood with source probability by believing that there is a 1 in 10,000 chance that the evidentiary sample did not come from the defendant. This equation of random match probability with source probability is known as the prosecutor's fallacy."

Such a fallacy is dangerous, as the probability of finding a random match can be much higher than the probability of matching one individual, given the weight of the non-DNA evidence. See, William C. Thompson and Edward L. Schumann, *Interception of Statistical Evidence in Criminal Trials,* 11 L.ANDHUM.BEHAV.167, 170-71 (1987)(noting that the prosecutor's fallacy "could lead to serious error, particularly where the other evidence in the case is weak and therefore the prior probability of guilt is low").

The prosecution could elicit that the DNA match is one in whatever number of people randomly selected from the population would also match the DNA found. That is random match probability. However, giving a percentage that the DNA was found to be Joseph Henderson was impermissible. That is source probability. Additionally, an expert should be precluded from

stating, and the prosecutor precluded from arguing identity is assumed. This is impermissible for the same reasons already mentioned herein. **Brown**, Supra.

IV. MR. HENDERSON'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COURT DENIED DEFENSE MOTION FOR A MISTRIAL AFTER THE TESTIMONY OF KIM MURGA.

Following the testimony of Ms. Murga, the Defense made an oral motion for mistrial, or in the alternative to strike the testimony of Kim Murga, the DNA laboratory manager for the Las Vegas Metropolitan Police Department crime laboratory. (APP. 567) The motion was based on multiple points:

1) Kim Murga was noticed as an expert witness by the State 20 days prior to trial.

In her response to the notice problem, the prosecutor informed the court that she had not been sure whether or not Mr. Welch (another DNA witness used by the State) would appear to testify. (APP. 567-8) Mr. Welch was retired from Metro DNA lab and apparently, "the county did not pay him in a timely fashion, (for testimony in another case) and he was back and forth whether he was going to testify for us in this case. I spent probably an hour and a half on the phone trying to get him to agree to come in for this case." (APP. 567) Not wanting to be without an expert to testify at trial, the State had noticed Ms. Murga, although a day late, and had a conversation with defense attorney regarding the possibility of Ms. Murga testifying. The Defense was under the impression that either Mr. Welch or Ms. Murga would be testifying, but not both. That is, "if Mr. Welch were to be unavailable then she would be the substitute for him." (APP.568)

2) Ms. Murga used notes in her testimony that had not been previously provided to the defense, thereby violating Brady v. Maryland and discovery rules.

During cross examination, Ms. Murga referred to notes she made when reviewing Mr. Welch's work. The defense had not previously seen the notes and had to ask the court for a recess in order to have a look at the notes. (APP. 565) Defense counsel argued to the court that:

> . . . the additional problem we have with this testimony in doing so is there is no report or record of any of the work that is done by Ms. Murga at all, until I walk in here in the middle of a case and begin to cross-examine her in front of the jury and note are produced and I have to literally take a break and read these notes which I cannot now confer with my expert regarding any of these notes, and to be able to properly cross-examine them on it.
> We have the complexity of not only the prejudicial nature of her testimony, but we also have a discovery violation. . . . The discovery rules say that they have an ongoing responsibility to provide all discovery especially when it comes to expert witnesses.
>
> Any new notes or any new reports that are generated by the Las Vegas Metropolitan Police Department forensic lab must be timely turned over to the Defense.
>
> They had three weeks to do it and now I'm completely surprised by this and have to cross-examine Ms. Murga the best I can with these notes.
>
> These notes are basically a summary, that is true, of what was already done by Mr. Welch and Ms. Gunther.
>
> However, there is also – and we've made it a court exhibit and I'm going to ask it be introduced as a court exhibit, there is also mathematical calculations on there and other notions regarding her analysis of all which I would like to show to my expert to say, are these numbers correct? Are they reasonable? Did she do this right? I can't do that in the middle of trial. (APP. 568)

"Suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecutor.'" **Giglio v. United States**, 405 U.S. 150, 154 (1972). Mr. Henderson need only show that the suppression of the evidence undermined the outcome of the trial. Not having the notes for an expert to look at and verify hampered the defense and thereby undermined the outcome of the trial. "One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." **Kyles v. Whitley**, 514 U.S. 419, 435 (1995). **Brady** material includes not only information physically in the possession of the prosecutor. The State should have anticipated that their forensic witness would have notes that the defense would want to verify. This Court recognizes "'the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers.'" **State**

v. Bennett, 119 Nev. Adv. Rep. 63, 81 P.3d 1, 28 (2003), *quoting* Jimenez v. State, 112 Nev. 610, 620, 918 P.2d 687 (1996).

Brady and its progeny require the State to disclose evidence favorable to the defense if the evidence is material either to guilt or to punishment. Brady v. Maryland, 373 U.S. 83 (1963); Jimenez v. State, 112 Nev. at 618-19. Failure to do so violates due process regardless of the prosecutor's motive. *Id.*

> In sum, there 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. (Citations omitted).

Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25 (2000).

> Due process does not require simply the disclosure of exculpatory evidence. Evidence also must be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks.

Lay v. State, 116 Nev. 1185, 1199, 14 P.3d 1256, 1261 (2000) (citations omitted).

The prosecutor has a duty to locate and identify material evidence favorable to the defense. Jimenez, 112 Nev. at 618-19.

The crux of this case came down to DNA evidence. The defense needed to be able to have their expert verify the accuracy of these notes and not be in a position to have to read the notes for the first time during the middle of trial.

3) By allowing Ms. Murga to testify, the State in essence was allowed to vouch for the reliability of their witness Mr. Welch.

Due process is violated when a prosecutor vouches for the veracity its witnesses. An opinion as to the veracity of a witness when veracity may determine the ultimate issue of guilt or innocence is improper. Witherow, supra. "It is for the jury, not the prosecutor, to say which witnesses were telling the truth." Witherow, supra.,at 725, citing Harris, 402 F.2d 658. Ms.

Murga's testimony, in essence, was used by the State to vouch for the testimony of Mr. Welch, another State witness.

Court's universally condemn the eliciting of testimony concerning the veracity of a witness. In **United States v. Sanchez**, 176 F.3d 1214, 1219-1220 (9th Cir. 1999) the Court found that questions such as this are improper because the "determinations of credibility are for the jury not for the witnesses".

Ms. Murga did no independent testing of the DNA. In essence, all that Ms. Murga's testimony did was to vouch to the jury what a good job she thought Mr. Welch had done in his testing.

V. MR. HENDERSON WAS DENIED A FAR 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.

During voir dire the defense requested of the court that "pursuant to the Foster Decision, we were requesting that we not be required to voice the peremptory challenges in open court, since the Nevada Supreme Court strongly recommends it's not done in that fashion. (APP. 410) See, **Foster v. State**, 121 Nevada 165. Defense counsel further told the court that "in that headnote the Supreme Court says "We emphasize, however, our strong preference that, in accordance with the American Bar Association standards, the trial courts of the State should assure that all peremptory challenges during jury select are exercise and considered outside the presence of a jury venue."' (APP.410) If a peremptory challenge is announced from the bench, it will not be known to the jurors whether the defense or the State excused a prospective juror. That way jurors will not be concerned as they go through the process of voir dire why the defense of why the State would strike them.

After defense counsel offered different possible ways to comply with this Nevada Supreme Court's suggestion, the trial court responded, "Much ado about nothing, in my view. I

appreciate the input from all concerned. I'm not inclined to change my method of doing this for the last 27 years." (APP. 410)

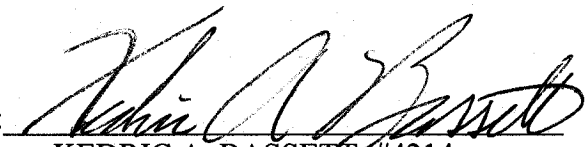
By failing to follow the Supreme Court's suggestion for conducting voir dire, the trial court denied Mr. Henderson his right to a fair trial and an impartial jury.

CONCLUSION

Based on the foregoing, the conviction against Joseph Henderson should be vacated. .

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 27th day of March, 2009.

PHILIP J. KOHN
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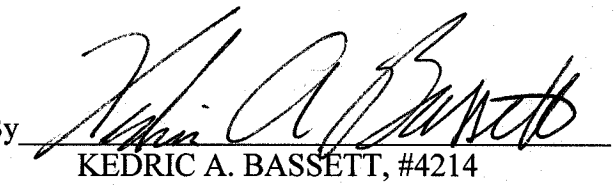
By 

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Appellant's Opening Brief to the attorney of record listed below on this 27th day of March, 2009.

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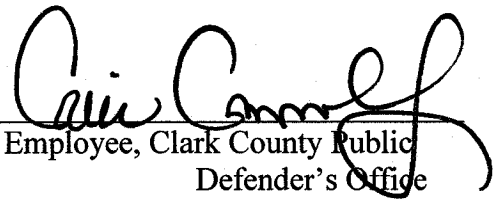
BY 
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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 52573

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON, Appellant, v. THE STATE OF NEVADA, Respondent.	)	Case No. 52573

RESPONDENT'S ANSWERING BRIEF

Appeal from Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County

STATEMENT OF THE ISSUES

1. Whether Defendant Was Prejudiced By The State's Handling Of The DNA Evidence.
2. Whether The District Court Erred When It Did Not Grant Defendant's Request For Alternative Relief After His Motion To Dismiss Was Denied.
3. Whether The District Court Erred In Denying Defendant's Motion In Limine Regarding The Prosecutor's Fallacy Argument.
4. Whether The District Court Erred By Not Granting Defendant's Motion For Mistrial After The Testimony Of Kim Murga.
5. Whether The District Court Erred When It Refused Defendant's Request Not To Voice Peremptory Challenges During The Second Day Of Voir Dire.

STATEMENT OF THE CASE

On July 11, 2005, a fourteen count Information was filed by the State charging Joseph Henderson ("Defendant) 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 (two counts), conspiracy to commit sexual assault, sexual assault with use of a deadly weapon (three counts), conspiracy to

commit robbery, robbery with use of a deadly weapon (two counts), open or gross lewdness and battery with use of a deadly weapon resulting in substantial bodily harm. Appellant's Appendix ("AA) 129-134. On July 14, 2005, the Defendant pled not guilty to all charges. AA 304.

The original trial date for this matter was set for early 2006, but the date was vacated and reset numerous times at Defendant's counsel request. AA 305-308. On August 21, 2007, the trial date was vacated and reset again at Defendant's request. AA 308. Additionally, Defendant's counsel advised the district court that they will retain an expert that will be reviewing the State's DNA reports and they will let the court know at status check whether the Defendant will retest the DNA evidence. AA 308. On September 27, 2007 and March 19, 2008, the Defendant's counsel informed the district court that they were going to retest the DNA evidence. AA 310-311. However, on April 2, 2008, the Defendant's counsel informed the District Court that they were going to use an expert to confer with regarding the DNA testing, but that the Defendant will not be retesting the DNA. AA 311-312.

On June 3, 2008, Defendant filed a Motion to Dismiss for Destruction of Evidence and a Motion in Limine To Preclude "Prosecutor's Fallacy, Arguments Regarding DNA Material. AA 196-208. On June 16, 2008, the State filed its Oppositions to both of Defendant's Motions. AA 209-220. On June 17, 2008, the District Court denied both of Defendant's motions. AA 312-313.

On June 23, 2008, the trial finally commenced. AA 313. Defendant was convicted of all counts on June 27, 2008. AA 316. On August 28, 2008, Defendant was sentenced by the trial court. AA 318-319. The Judgment of Conviction was filed on September 24, 2008. AA 294-299.

Defendant filed his Notice of Appeal on October 9, 2008. AA 300-303. The State's Response follows.

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STATEMENT OF THE FACTS

After spending some time traveling, Dr. Eric Bernzweig ("Eric) and his fianc e, Julie Kim ("Julie), were attempting catch up on some much needed rest on the night of September 3, 2004 at their residence located in the northwest part of Las Vegas, Nevada. AA 462-463. At approximately 12:30 a.m. that night, an "olive-skinned man rang the doorbell. AA 463-464. The olive-skinned man told Eric that he was his neighbor and that his son had thrown his keys into Eric's backyard. AA 463. The olive-skinned man asked if he could look for his keys in the backyard. AA 463. Eric closed and locked the front door and in effort to help his alleged neighbor, went to the backyard, turned the lights on and attempted to find the keys, to no avail. AA 463-464. The olive-skinned man then asked Eric if he could go to the backyard and look for the keys with Eric, at which time Eric let him in and took him through his house to the backyard. AA 464.

After not finding the keys in the backyard, the olive-skinned man told Eric he was going to go to his car to get a flashlight to aid in the search for the keys. AA 464. Eric went to his garage to try to find a flashlight. AA 464. Eric returned from the garage, to find the olive-skinned man in his house with two masked black men both wielding guns with laser sights (hereinafter collectively referred to as "intruders). AA 464.[1] Defendant was one of these masked intruders. The intruders tied Julie hands with plastic ties. AA 435. They tried to tie Eric up with the plastic ties but when the plastic ties did not fit, they used a pair of seemingly real handcuffs[2] and took him to upstairs portion of the house. AA 467

The olive-skinned man demanded to know where Eric kept the safe. AA 465-466. Eric told them that he did not have a safe. AA 465-466. In an attempt to appease the intruders, Eric gave them approximately a thousand dollars he had hidden in a

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[1] Eric testified he was able to tell that the color of the masked intruders skin by looking at their hands. AA 464

[2] At the time, it would appear that the intruders were unaware that the handcuffs were "gag handcuffs that did not require a key to open.

closet. AA 465-466. While the intruders were occupied, Eric was able to get out of his handcuffs. AA 468. He attempted to get down the stairs but was caught by one of the masked intruders eventually leading to a scuffle with both masked intruders. AA 468. However, while scuffling with one of the intruders, Eric was pistol-whipped two or three times, splitting his head open. AA 468. Eventually, the intruders tied Eric up with electrical cords and left him to bleed on the floor. AA 469.

While the olive-skinned man and the other masked intruder were looking for the safe with Eric, the Defendant was downstairs with Julie. AA 436. Defendant held her at gunpoint, put a pair of Eric's swim trunks over her head, put a cat toy in her mouth and threatened to kill her if she screamed. AA 436. He then began to fondle her, placed his mouth on her breasts and sexually assaulted her by inserting his fingers into her vagina. AA 436-438, 440. He then forced Julie to spread her legs and sexually assaulted her by inserting his penis in her vagina. AA 439

Defendant was distracted by the commotion caused by Eric's scuffle with the other intruders in the upstairs part of the house. AA 439-441. Defendant then took Julie upstairs to the master bedroom, placed her face down on the bed and sexually assaulted her for a third time by inserting his penis in her vagina. AA 441-442.

Shortly after Defendant's last sexual assault, the intruders tied up Julie's legs and left the home. AA 445. Julie worked her way loose and discovered Eric lying in a pool blood. AA 445-446. She untied him and they went downstairs to call the police. AA 446, 470.

Julie was taken to UMC, where she underwent a sexual assault examination including buccal swabs, vaginal swabs and breast swabs from the area of her breasts where the Defendant put his mouth. AA 480. Additionally, crime scene investigators collected, among other things, the top sheet and fitted sheet from the master bedroom. AA 522-523.

Las Vegas Metropolitan Police Department ("LVMPD) forensic scientist David Welch was able to develop unknown male profile from the foreign DNA

material detected on the breast swabs of the victim. AA 514-515.[3] Welch also tested one of the vaginal swabs but was unable to develop a profile from the vaginal swab.[4] AA 517. The DNA profile from the unknown male was searched against the local DNA Index System and no matches were found. AA 44. The DNA profile was then uploaded to the National DNA Index System for comparison. AA 88. Later, a "CODIS HIT was discovered and came back to Defendant, who was already in custody for another matter. AA 35.

LVMPD Detective Michael Jefferies obtained a search warrant for a buccal swab from Defendant, to confirm the DNA match was true and correct. AA 485. In March 2005, LVMPD forensic scientist Kathy M. Guenther ("Guenther), using the unknown male profile created by Welch and the profile created from Defendant's buccal swab, discovered a positive match or positive comparison with Defendant's DNA on all 13 locations used by LVMPD forensic scientist to match DNA at the time. AA 530. Guenther testified under statistical threshold set in the LVMPD laboratory the chances of a random selective sample to have the same profile was six hundred billion (6,000,000,000) to one (1). AA 531. Because six hundred billion is hundred times the earth's population at the time, under laboratory standards identity is assumed.[5] AA 531-532.

In March of 2005, Defendant was officially confirmed as the source of the foreign DNA material taken from Julie Kim body, at which time he was arrested. AA 487.

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[3] Welch testified that he used both breast swabs because based on his experience (thirty years working experience as a forensic scientist) there is usually very little foreign DNA on the breast swabs and that in order to have the best shot at developing a profile it was his policy to always use two breast swabs for an extraction. AA 514.

[4] Welch testified that his testing of the vaginal swab indicated that semen was present but could not find any spermatozoa (aka sperm), which prevented him from making any conclusive results. AA 517.

[5] The only exception is if an individual has an identical twin. Identical twins can have the same DNA. AA 511. In this case, there is no indication that the Defendant has an identical twin and no such a defense was ever offered by Defendant's counsel.

Additionally, on July 25, 2005, Guenther conducted further DNA testing from Julie's sexual assault examination. AA 532.[6] The testing included extractions from the buccal swab and vaginal swabs[7] from Julie, as well as the bed sheets removed from the bed in the master bedroom, and the bathrobe found in the master bedroom. AA 532. Semen with sufficient spermatozoa was detected on one of the bedsheets (in two separate stains) and the vaginal swab. AA 534-535. Once again, Defendant was found to be a complete match with the DNA profiles created by the extractions from the soiled bedsheet and the vaginal swab. AA 535.

ARGUMENT

I

DEFENDANT WAS NOT PREJUDICED BY THE STATE'S HANDLING OF THE DNA EVIDENCE

A. The DNA Evidence Was Not Fully Consumed By The State's Testing.

Defendant contends that his conviction should be vacated because the State consumed all the DNA material and therefore the Defendant was unable to retest the DNA material. Defendant states that all "significant portions of this DNA material was consumed by the Government. He claims that the State's actions prevented him from retesting and challenging the conclusions made by the State regarding the DNA. However, the record clearly indicates that is not the situation in this case. Defendant could not only retest the DNA material but that he actually chose not to retest it.

Originally, the Defendant counsel stated that they were not going to retest the DNA material. AA 312. However, some months later, Defendant made a motion to dismiss this case based on consumption of the DNA material. AA 196-200. The State opposed Defendant's motion by stating that evidence was neither lost nor destroyed

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[6] By July of 2005, the LVMPD forensic lab added two additional markers for DNA match and now had 15 threshold points to match. AA 534. Guenther re-profiled the Defendant known sample in order to compare his sample with the DNA testing of the rest of the sexual assault examination kit. AA 535.

[7] Despite Defendant's claims that vaginal swabs were completed used up during this time (Appellant's Opening brief, p. 5), Guenther testified that part of both remaining vaginal swabs were saved for retesting and were still being maintained as of the date of trial. AA 533.

and that the extraction from the breast swabs as well as actual vaginal swabs and bedsheets were all available to the Defendant for retesting. AA 209-214. At the trial, LVMPD forensic scientist Guenther testified regarding the vaginal swabs indicating she took "half of each of the remaining two swabs and sav(ed) half of each for…further analysis. AA 533. This led to the following questioning by the district attorney:

> Ms. Kollins: First and Foremost, you preserved portions of those swabs available for retesting; is that correct?
>
> Ms. Guenther: That's correct.
>
> Ms. Kollins: And those are maintained today?
>
> Ms. Guenther: That's correct.

AA 533. Additionally, Defendant counsel never contradicted the State's argument that the bedsheets were available for retesting. Therefore, the only item containing DNA material that might have been fully consumed and therefore unable to be retested is the breast swabs.

Welch testified that while there were no breast swabs left there was an "extract that was placed in Metro DNA vault freezer for future analysis. AA 504. Therefore, the Defendant had the opportunity to retest the extraction.[8] The Defendant never bothered to do any such retesting, nor does he explain why the preservation of the extraction from the breast swabs as opposed to the original material prejudices him. Because, the Defendant has had several opportunities to retest the original DNA material from vaginal swabs and the bedsheets, the opportunity to test the extraction from the breast swabs and the opportunity to examine the State's DNA experts under oath, he was not prejudiced by the State's use of the DNA material.

[8] This is also referenced in the State's Opposition to Defendant's Motion to Dismiss filed nearly a year ago. AA 209-214.

B. Even If One Assumes, *In Arguendo*, That Certain DNA Material Was Fully Consumed, The Defendant Failed To Show That The State's Actions Were Done In Bad Faith Or That The Defendant Suffered Undue Prejudice.

Even if this Court finds that breast swabs were fully consumed by the State, these actions do not automatically violate the due process rights of the Defendant. The Defendant must show that the State's loss or destruction of the evidence was done in bad faith or that the Defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed. Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001); Williams v. State, 118 Nev. 536, 552, 50 P. 3d 1116, 1126 (2004). The burden is on the Defendant to show that it could be reasonably anticipated that the evidence sought would be exculpatory and material to the defense. Leonard, 117 Nev. at 68, 17 P.3d at 407 (quoting Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)). It is not sufficient to show " 'merely a hoped-for conclusion' " or " 'that examination of the evidence would be helpful in preparing [a] defense.' Id.

1. The State did not act in bad faith in its handling of the DNA material.

Governmental bad faith has been shown where evidence was lost as a result of inadequate governmental handling. Crockett v. State, 95 Nev. 859, 865, 603 P.2d 1078, 1081 (1979). Or when the government has kept evidence a "secret in the hopes that it could use the information to impeach the defendant on the stand, McKee v. State, 112 Nev. 642, 648, 917 P.2d 940, 944 (1996). However, bad faith has not been found where the defendant can question the accuracy of tests or examinations by means different from an independent evaluation of the evidence itself. City of Las Vegas v. O'Donnell, 100 Nev. 491, 493-494, 686 P.2d 228, 230 (1984). Furthermore, this Court has held that it is not bad faith for the government to follow its own standard procedures. Id. at 494, 230.

In this case, Welch, a forensic scientist with thirty years of experience, testified that he followed his typical policy regarding developing a DNA profile from breast

swabs. AA 514. Welch testified that he typically used two breast swabs to attempt to create a DNA profile because in his past experiences the use of one breast swab would often lead to poor or inconclusive results. AA 514. In his expert opinion, it was necessary for him to use both breast swabs in order to have the best chance of developing a DNA profile for the person who sexually assaulted Julie. AA 514. It would have been impossible for the State to conduct any type of joint testing with the Defendant at the time because the Defendant was not even a suspect at this time. An extraction of the breast swab remained, was preserved and was made available for any retests requested by Defendant. AA 504, 514. Therefore, it cannot be argued that Welch acted in bad faith when he used both breast swabs.

Defendant argues that the State acted in bad faith by doing final testing in July 2005, when the State was aware that he had counsel, which destroyed the remaining DNA material. Deft. Opening Brief, p. 6. This argument is disingenuous and factually inaccurate. The State did test additional vaginal swabs, as well as the bedsheets and a bathrobe[9] for DNA material in July 2005, but there is no indication in the record that any of these items were destroyed or unavailable for retesting. As stated above, the State did preserve parts of two vaginal swabs and the bedsheets. AA 533. Therefore, the Defendant's ability to retest the materials was not destroyed but was instead preserved.

2. The Defendant was not prejudiced by the State's handling of the DNA material.

Defendant has failed to show that the State could reasonably anticipate that if the State preserved a breast swab it would have been exculpatory and material to the defense. Leonard, 117 Nev. At 68, 17 P.3d at 407 (citation omitted). In fact, the record in this case plainly indicates that a retest would not have been exculpatory. The record not only shows that DNA profile from the breast swabs matched the Defendant's DNA profile but so did the independently tested DNA profiles derived from the

[9] The bathrobe ended upon not containing any DNA material. AA 534.

bedsheet and the vaginal swabs – both of which were examined under an even stricter standard then the breast swabs. AA 534-535.

While Defendant claims in his opening brief that there were several areas where the examination of the DNA material could be called in question, he fails to point to a single place in the record that indicates that questionable methods or tactics were utilized by the LVMPD forensic laboratory.[10] The Defendant retained his own DNA expert, but never offered testimony regarding the scientific methods or tactics used by the LVMPD forensic laboratory. As stated in Leonard, "a mere-hoped for conclusion is not enough to satisfy the Defendant's burden in showing that he suffered undue prejudice. Id. Thus, Defendant's mere hoping that Welch was wrong with his analysis of the breast swabs is not enough to show the Defendant was unduly prejudiced and this Court should uphold his conviction and the district court's ruling.

II

THE DISTRICT COURT'S DENIAL OF DEFENDANT'S REQUESTED ALTERNATIVE RELIEF DID NOT VIOLATE HIS RIGHT TO DUE PROCESS

Defendant alleges that the district court's failure to grant him alternative relief after its denial of his Motion to Dismiss constitutes a violation of his right to due process. The Defendant makes this argument by essentially reasserting the arguments he utilized in Argument I.

The Defendant claims that the State should have been precluded from presenting evidence regarding the DNA because of its failure to preserve the DNA sample. As stated above, the Defendant misstated the record; uncontested testimony shows that the DNA material was preserved and that the Defendant chose not to retest it.[11]

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[10] Defendant also refers to the breast swab as the "sole piece of evidence linking him to the crime scene . Deft. Opening Brief, p. 7. This is not true. There are several other pieces of evidences that link him to the crime scene besides the breast swabs including the semen found in the vaginal swabs and the semen found on the bedsheet.

[11] *See* Argument I.

Additionally, the Defendant claims that the district court erred by not issuing a Sanborn instruction to the jury instructing them that the DNA material *did not* match the Defendant. In Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), the police failed to test a weapon that was used to shoot the defendant, in order to determine whether the weapon had been used by the victim and consequently, whether the defendant had been acting in self-defense. The Court held that the defendant was entitled to an instruction adverse to the State, because "the State's case was buttressed by the absence of this evidence. Therefore, the State cannot be allowed to benefit in such a manner from its failure to preserve evidence. Id., 107 Nev. at 408, 912 P.2d at 1286.

This case is easily distinguishable from Sanborn. In Sanborn, the gun was clearly a piece of exculpatory evidence that was mishandled and never tested by police. In this case, the breast swabs were properly handled according to the policy of the forensics laboratory and the extraction was preserved so the Defendant could have it retested. Additionally, besides the Defendant's bare and unsupportive assertions, there was no indication that breasts swabs would be exculpatory. Although the Defendant did retain a DNA expert, that expert did not testify that such swabs could be exculpatory. This is especially true, when one considers that two other pieces of evidence obtained from the sexual assault examination kit also identified the Defendant as the assailant with reasonable scientific certainty.

Defendant has failed to show how the State failed to properly preserve the DNA material or how the district court's denial of his motion to dismiss entitled him to alternative relief. Consequently, no jury instruction was warranted nor was there any need to exclude the DNA evidence.

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III
THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION IN LIMINE

Defendant in his opening brief makes the same argument he put forward in his Motion-in-Limine to Preclude "Prosecutor's Fallacy, Arguments Regarding the DNA Material. Basically in citing Brown v. Farwell, he argues that it is improper for the State to present statistical evidence that "confuses source probability with random match probability. Brown v. Farwell, 525 F.3d 787, 795 (9th Cir. 2008). Defendant goes on to argue that "random match probability is acceptable but "giving a percentage that the DNA was found to be Joseph Henderson was impermissible. [12] Appellant's Opening Brief, p. 8. Noticeably absent in Defendant's brief is any citation to the record that the prosecutors in this case actually made such an error. That is because neither the prosecutors nor any of the State's witnesses ever offered the jury a source probability percentage but instead used the acceptable, but overwhelming, random match probability number (six hundred billion to one).

Additionally, this case is distinguishable from Brown in several ways. Brown involved a sexual assault case that occurred in 1994 in Washoe County, Nevada. The defendant in that case had four brothers living in the same vicinity. One of the defendant's brothers was actually identified as the assailant at one point in the investigation by the victim. Brown, 525 F.3d at 796. The defense also provided an expert report which attacked the Washoe County DNA expert methodology. Brown, 525 F.3d at 792. Specifically, the Ninth Circuit found the Washoe County DNA expert testimony was unreliable because of the prosecutor's fallacy and his failure to account for the logical implications of having four brothers in the same vicinity. Brown, 525 F.3d at 796-797.

[12] The misuse of testimony confusing random match probability with source probability is referred to as "prosecutor's fallacy in Brown. Brown, 525 F.3d at 795.

In this case, unlike Brown, the prosecutors did not misuse statistics by confusing random match probability with source probability nor was there any expert report provided by the Defendant that the methodology used by the LVMPD forensics lab was unreliable or failed to account for something unique about the matter.[13] Additionally, there was no evidence in the record that people with similar DNA as the Defendant (like brothers) were in the same vicinity during the night in question. Finally, due to the limitations of DNA technology in 1994, the DNA expert in Brown was only able to give a random match probability number of three millions to one. Due to the advances made in DNA technology, the LVMPD forensic scientists were able to give a random match probability in this case of six hundred billion to one in 2004.

Defendant also argues that State's experts should be precluded from arguing that identity is assumed due to reasons already mentioned in the brief – namely the prosecutor's fallacy argument. As stated above and as shown in the record, the prosecutors in the case at bar did not commit such an error. Additionally, the LVMPD DNA laboratory uses a high threshold (six hundred billion to one) for determination of an identity threshold. Since six hundred billion is more than hundred times the earth's population at the time of the testing, the LVMPD forensic scientist can state with reasonable degree of scientific certainty that Defendant was the source of the foreign DNA material in the sexual assault examination. AA 531-532; Gaines v. State, 116 Nev. 359, 370, 998 P. 2d 166, 173 (2000) (recognizing DNA testing as a tool that can be used to accurately identify a criminal attempting to conceal his identity). Therefore, the district court was correct to deny Defendant's Motion in Limine.

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[13] Defendant did allegedly retain a DNA expert for consulting purposes but no expert report was ever produced nor did the Defendant put his expert on the stand to contradict the findings or methodology used by the State. AA 311-312.

IV

THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL AFTER THE TESTIMONY OF KIM MURGA

A. The State's Notice Of Kim Murga As An Expert Witness 20 Days Prior To Trial Did Not Violate The Defendant's Right To Due Process.

Defendant argues that his rights were violated by the testimony of Kim Murga ("Murga) because, among other things, the State noticed her one day late. Defendant makes this assertion despite his trial counsel acknowledgment to the district court that he was made aware of the possibility of Murga testifying "way more than 21 days prior to the trial. AA 568.

This Court has held that a district court's decision whether to allow an unendorsed witness to testify is to be examined for abuse of discretion. Mitchell v. State, _ Nev. _, 192 P.3d 721, 729 (2008). The district court has broad discretion in fashioning a remedy for violation of discovery statute, and it does not abuse its discretion absent a showing that the state acted in bad faith or that the nondisclosure caused substantial prejudice to the defendant which was not alleviated by the court's order. Evans v. State, 117 Nev. 609, 637, 28 P.3d 498, 518 (2001), Langford v. State, 95 Nev. 631, 635, 600 P.2d 231, 234 (1979), Maginnis v. State, 93 Nev. 173, 176, 561 P.2d 922, 923(1977). Defendant cannot and does not demonstrate either an abuse of discretion or that the State acted in bad faith.

In this case, the prosecutor for State stated the reason for the one day late disclosure was that she was unsure twenty-one days before the trial if Welch (who had retired from LVMPD) would be available to testify as a DNA expert and she was trying to ensure the State had a DNA expert available. AA 567. The district court found good cause for the excusal of the one day shortfall in notice. AA 569. Nothing in Defendant's brief asserts why the district court judge ruling that there was good cause for the delay was improper or how it was prejudicial.

B. The State Did Not Violate Brady V. Maryland.

The United States Supreme Court, in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), held that the Due Process Clause of the United States Constitution imposes upon the State a duty and obligation to disclose "evidence favorable to an accused upon request ... where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1197; *See also* Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 1001 (1987). The evidence to which the Court referred was both exculpatory evidence and impeachment evidence. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972). *See also* United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985). The duty to disclose such evidence also applies whether or not there has been a request for such evidence by the accused. United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399 (1976).

Having mandated in Brady, that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," 373 U.S. at 87, 83 S.Ct. at 1197, the Supreme Court has outlined the three elements of a Brady violation. Strickler v. Greene, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 1948, (1999). The Supreme Court has explained: "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." 527 U.S. at 281-282, 119 S.Ct. at 1948; *also see* Wade v. State, 115 Nev. 290, 295-296, 986 P.2d 438, 441 (1999) (reversal for a Brady violation will only occur if there is a reasonable possibility that the trial would have been different if the suppressed documents had been disclosed to the defendant)

Murga was called by the State to discuss the DNA testing performed at the LVMPD forensic lab and her peer review of the testing in this matter.[14] Her notes do not constitute a violation of the principles stated in Brady. Nothing in Murga's two page note was favorable to the accused. The note according to the record lists what was included in the sexual assault examination kit, the mathematical formulas used to determine the random match probability of the DNA profile (the same formulas used by Guenther in her report) and a chronological list of events to help her familiarize herself with the file. AA 568-569. None of these items could reasonably be used to impeach a State witness or exculpate the Defendant.

Additionally, the Defendant was not prejudiced by Murga's two-page note because he was already aware of the information it contained. Murga created the note as a summary of the evidence. AA 569. All the information contained in Murga's note was made available to Defendant well before trial even if the actual note did not exist yet. AA 569. Defendant actually obtained full and complete analyses of the DNA evidence in late August 2008. AA 569. As the district court recognized, Murga's note were simply a supervisor's checklist of what occurred and a confirmation of the work performed by Welch and Guenther and in no way prejudices the defense. AA 569

C. Murga's Testimony Was Not Improper.

Murga's testimony was not impermissible vouching as suggested by the Defendant. She never commented on the veracity of Welch and Guenther; rather, she simply discussed the peer review she conducted on her co-workers in this matter and the results of that review. The peer review at the LVMPD forensic laboratory was brought up and questioned by both by the prosecutors and the Defendant's counsel during direct and cross-examination of Welch and Guenther. Therefore, testimony about the actual review and the findings from that review was appropriate.

[14] Defendant's counsel brought up the review process during cross-examination of the State's previous two DNA witnesses (AA 516, AA 536).

It is true that it is improper for one witness to vouch for the testimony of another and that an expert witness is not permitted to testify to the truthfulness of a witness. Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151, 158 (1998), abrogated on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000). However, Defendant's attempt to find support in Witherow v. State is misplaced because that case revolves around the prosecutor asserting his opinion of the veracity of a witness during closing arguments, which is improper. Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988). In this case, there is no record that the prosecutor ever made similar statements regarding the veracity of a witness during the course of the trial nor does the Defendant even assert such a thing. Additionally, United States v. Sanchez is also easily distinguishable from this case. Sanchez revolved around the prosecutor's asking one witness direct questions about the veracity of another witness, which the Ninth Circuit found inappropriate. United States v. Sanchez, 176 F.3d 1214, 1219-1220 (9th Cir. 1999). In this case, the prosecutors asked Murga about her conclusions from her review of Welch's and Guenther's work per normal procedures at the LVMPD forensic laboratory, not about the veracity of their testimony.

The district court did not err in allowing Murga to testify regarding the peer review conducted at the LVMPD forensic laboratory. Her testimony did not constitute improper vouching for the truthfulness of other witnesses. The Defendant's claim must be denied.

V

DISTRICT COURT DID NOT ERR IN DENYING THE DEFENSE'S REQUEST NOT TO VOICE PEREMPTORY CHALLENGES IN OPEN COURT

Defendant claims that he was prejudiced by the district court's failure to hear peremptory challenges outside the presence of the potential jury. However, noticeably absent from his is any reason why he thought he was prejudiced by the voice

peremptory challenge or any specific instance and trial where he was prejudiced by the voice peremptory challenges.[15]

In Foster v. State, 121 Nev. 165, 111 P.3d 1083 (Nev. 2005), this Court enunciated a strong preference, not a mandate, that the state trial courts "should assure that all peremptory challenges during jury selection are exercised and considered outside the presence of the jury venire. Id., 121 Nev. At 173, 111 P.3d at 1089. The primary focus of the Foster Court was to eliminate jury bias. The language left it up to the discretion of the trial court in whether or not to actually conduct peremptory challenges outside of the jury, with the caveat that not adhering to the suggestion would subject the court to review but not necessarily a reversal.

Foster concerned a woman who was peremptorily challenged in the presence of the jury venire that was subsequently retained on the jury panel. This Court held that, notwithstanding the potential for bias, "[t]here [wa]s nothing in the record to suggest that the female juror who was peremptorily challenged and ultimately retained on the panel exhibited any bias or prejudice for or against either party and therefore "the reinstatement of the juror in question did not offend Foster's rights under the United States or Nevada Constitutions. 121 Nev. At 174, 111 P.3d at 1089. It is important to note that the Foster Court did not grant the defendant's appeal even though the female juror was originally preempted and then reinstated[16] because it found that record did not indicate any bias by that juror. Unlike Foster, in this case there was no preemption of a potential juror who was later reinstated.

Similarly, in the instant case, there is nothing in the record to suggest that the mere exercise of peremptory challenges by both parties in the presence of the jury

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[15] Defendant's counsel at trial did argue a hypothetical stating how the State's striking of two young male potential jurors may cause similar situated individuals in the potential jury pool to change their answers to voir dire questions. AA 410. However, Defendant's counsel never explains how such potential jurors would change their answers or even how that would prejudice the Defendant. AA 410. Additionally, there were several male jurors seated in this case. Defendant never argues (at trial or in his brief) that he was prejudiced by the dismissal of those two jurors.

[16] The female juror was reinstated after a successful Batson challenge was issued by the prosecutor regarding the defense's systematic pattern of striking all potential female jurors. Foster, 121 Nev. At 171, 111 P.3d at 1087.

venire prejudiced either party. Defendant counsel did not even bring up the situation until the second day of voir dire after numerous voice peremptory challenges were already made by both sides. Therefore, the district court did not err in denying the Defendant's request not to voice peremptory challenge.

CONCLUSION

For the foregoing reasons, Defendant's conviction and sentence should be affirmed.

Dated this 1st day of June, 2009.

Respectfully submitted,

DAVID ROGER
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Nevada Bar # 002781

BY /S/Steven S. Owens
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 1st day of June, 2009.

Respectfully submitted

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 52573

E-File

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 52573

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	NO. 52573 **E-File**

APPELLANT'S REPLY BRIEF

ARGUMENT

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.

The Respondent argues that the bed sheet DNA was preserved, but the breast swab was consumed. It was the breast swab that was the Defense's biggest concern as it was a DNA mixture, whereas the bed sheet was not. It was the breast swab that needed to be retested. Not being able to independently retest the breast swab prejudiced Mr. Henderson's ability to meaningfully confront the evidence against him.

Also, the Respondent argues that the Defense did not state in the record where the examination of the DNA was called into question. If the Defense did not challenge Murga's finding adequately, then why did the State call another witness to vouch for her conclusions?

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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.

The Respondent argues that the Defense did not call a DNA expert to testify that the swabs could have been exculpatory. This is a senseless argument. There were no DNA samples to independently test. The Defense certainly could not perform its own extraction to prove the evidence was exculpatory. The very reason a Sanborn instruction was needed was because not enough of a DNA sample had been preserved for the Defense to independently test. Failure to provide Mr. Henderson relief from this impossible situation violated his constitutionally protected right to due process.

III. THE COURT ERRED WHEN IT DENIED THE DEFENSE MOTION IN LIMINE AND THE GOVERNMENT SHOULD HAVE BEEN PRECLUDED FROM ARGUING AND PRESENTING EVIDENCE THAT JOSEPH HENDERSON'S IDENTITY IS ASSUMED AS A RESULT OF THE DNA TESTING.

Issue III of Appellant's Opening Brief is hereby incorporated by reference as if set forth in full in reply to Respondent's Answering Brief.

IV. MR. HENDERSON'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COURT DENIED DEFENSE MOTION FOR A MISTRIAL AFTER THE TESTIMONY OF KIM MURGA.

A. Issue IV(A) of Appellant's Opening Brief is hereby incorporated by reference as if set forth in full in reply to Respondent's Answering Brief.

B. The Respondent argues that none of Murga's notes could have been used to impeach her. Such an assumption can not be made when the Defense did not get a chance to have an expert look at the notes in order to evaluate if there was in fact potentially impeachment material in the notes. (During trial was the first that the Defense was aware of the notes and the trial court would only grant a few minutes break for the Defense to review the notes. (App. 565)

Certainly, not time to have the notes reviewed by a Defense expert, thereby violating the spirit of discovery rules. (App. 568)

The Respondent's claim that everything in the notes was the same information as the evidence given at trial, is not accurate. There were calculations and other notations not part of the testimony or the reports of Welch or Guenther. (App. 568-9) That was the problem. The Defense could not decipher nor analyze the notes without expert assistance. (App. 568-9) When the trial court inquired, "how is this beneficial to your case, Mr. Reed, assuming that you did inquire if the witness about these notes", Defense counsel how to answer, "That's a good question. If I could ask my expert I might be able to answer that question. I can't. I don't know the answer to that question." (App. 569) The ability to mount an informed defense was compromised. Accordingly, Mr. Henderson's constitutional right to due process was violated and his conviction should be vacated.

C. Issue IV(C) of Appellant's Opening Brief is hereby incorporated by reference as if set forth in full in reply to Respondent's Answering Brief.

V. 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.

Respondent argues there was no showing of prejudice resulting from the trial court's denial of the Defense request not to voice peremptory challenges in open court. However, because the peremptory challenges were made in open court, any potential jurors that were questioned following each preempt could then tailor their answers to voir dire based on their perception(s) as to why any previously excused juror was dismissed. This affects the ability and willingness of potential juror to honestly respond to voir dire. (The practice advocated by this Court in **Foster** assures much more open and honest responses to voir dire by potential jurors,

and therefore a more fair trial for all the parties.) By allowing peremptory challenges in open court, the trial court denied Mr. Henderson a fair trial.

CONCLUSION

In light of the various errors associated with Mr. Henderson's trial, the judgment of conviction should be vacated.

Respectfully submitted,

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By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 30th day of July, 2009.

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HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JOSEPH ALEXANDER HENDERSON
NDOC No. 67224
c/o Ely State Prison
P.O. Box 1989
Ely, NV 89301

BY _____
Employee, Clark County Public
Defender's Office

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52573

FILED

FEB 03 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit burglary, burglary with the use of a firearm, conspiracy to commit first-degree kidnapping, two counts of first-degree kidnapping with the use of a deadly weapon, conspiracy to commit sexual assault, three counts of sexual assault with the use of a deadly weapon, conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, open or gross lewdness, and battery with a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. Appellant Joseph Henderson raises four claims of error.

First, 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 of 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. See Hill v. State, 124 Nev. ___, ___, 188 P.3d 51, 54 (2008).

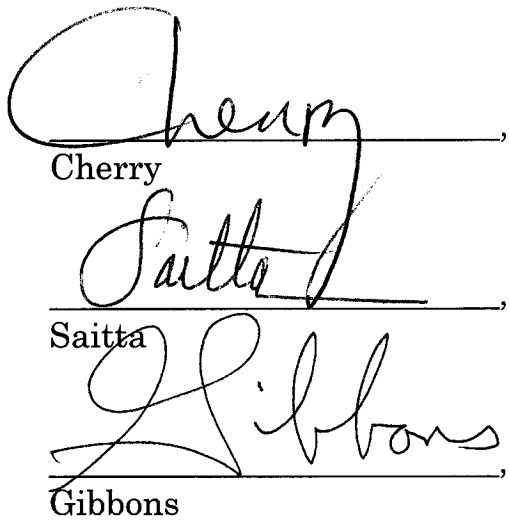
Second, Henderson claims that the district court erred by denying his pretrial motion to preclude the improper use of DNA evidence. Henderson does not allege that any improper DNA evidence or argument was presented to the jury, and therefore we conclude that this claim is wholly without merit.

Third, Henderson claims that the district court erred by denying a motion for mistrial and an alternative motion to strike the testimony of expert witness Kim Murga. Henderson's motion was based on three grounds: (1) Murga was noticed as a witness one day late, (2) her notes were not disclosed to the defense prior to her testimony, and (3) she improperly vouched for another witness. We conclude that the district court did not clearly abuse its discretion when it denied the motion and determined that (1) the State had good cause for its one-day delay in noticing Murga as a witness, (2) the State was not required to disclose Murga's personal summary of official reports already provided to the defense, and (3) Murga's testimony that another expert followed proper procedures in performing his DNA analysis was not improper. See Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001); Hernandez v. State, 124 Nev. ___, ___, 188 P.3d 1126, 1131 (2008).

Finally, Henderson claims that the district court erred when it required him to voice his peremptory challenges in open court. Although we have previously stated "our strong preference that . . . peremptory challenges during jury selection [be] exercised and considered outside the presence of the jury," Foster v. State, 121 Nev. 165, 174, 111 P.3d 1083, 1089 (2005), we have never mandated such procedures. And because Henderson fails to show prejudice, we deny relief on this claim.

Having considered Henderson's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52573

District Court Case No. C212968

FILED

MAR 11 2010

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

REMITTITUR

TO: Steven D. Grierson, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: March 2, 2010

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on MAR 05 2010.

Deputy Heather Ungermann
District Court Clerk

RECEIVED
MAR 10 2010
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

RECEIVED
MAR 04 2010
CLERK OF THE COURT

10-04356

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52573

District Court Case No. C212968

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 3rd day of February, 2010.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 2nd day of March, 2010.

Tracie Lindeman, Supreme Court Clerk

By: A. Ingerson
Deputy Clerk